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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

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CITIBANK, N.A.,

Petitioner,

v.

NGOC QUANG TRINH,

Respondent.

———

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

———

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QUESTION PRESENTED

Whether, contrary to the design of federal banking regulation, a United States bank may be held liable for deposits placed with its branch in a foreign country when the foreign government prevents the branch from repaying those deposits.

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CITIBANK, N.A.,

Petitioner,

v.

NGOC QUANG TRINH,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Citibank, N.A. ("Citibank") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.[1]

OPINIONS BELOW

The opinion of the court of appeals (App. A) is reported at 850 F.2d 1164. The orders of the court of appeals denying petitioner's petition for rehearing and sug-

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[1] Citibank is a wholly-owned subsidiary of Citicorp. The only subsidiaries or affiliates of Citibank whose stock may be publicly held are: Banco Honduras, S.A., Banco Internacional de Colombia, S.A., Central Holdings Corp., Citibank Espana, S.A., Citibank Italia, S.p.A., Citibank Portugal, S.A., CityTrust Banking Corp., Compagnie Generale de Banque Citibank, Famibank, S.A., Fuyo General Lease Co., Ltd., KKB Bank AG, Saudi American Bank, Taiwan First Investment & Trust Co., Ltd., and the United Bank of Trinidad and Tobago Limited.

gestion for hearing *en banc* (App. B) are unreported. The opinion and order of the district court (App. C) are reported at 623 F. Supp. 1526.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 1988, and the orders denying rehearing were entered on September 21 and September 22, 1988. The petition for a writ of certiorari is therefore due on December 20, 1988. This Court has jurisdiction to issue the writ under 28 U.S.C. § 1254(1) (1982).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The statutory provisions and regulations involved are reprinted at Appendices D-H.

STATEMENT

This case presents a question of vital importance to the federal banking system. As the United States stated in its *amicus curiae* brief below, the result reached by the Sixth Circuit "is contrary to sound policy and the national interest" and poses a serious threat to the U.S. banking system.

For nearly a century, U.S. banks have participated in foreign banking markets through branch offices. There are now over 900 branches of U.S. banks operating in 73 countries worldwide, owing to their depositors the equivalent of $225 billion.[2] For most purposes, these foreign branches operate as foreign banks: to a large extent, they obtain funds for their operations by taking deposits

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[2] *See* Department of Treasury, *National Treatment Study: Report to Congress on Foreign Government Treatment of U.S. Commercial Banking and Securities Organizations (1986 Update)* at 20; Brief for the United States as Amicus Curiae at 2, *Wells Fargo Asia Ltd. v. Citibank, N.A.*, 852 F.2d 657 (2d Cir. 1988) (No. 87-7685).

from nationals of the foreign country, they lend funds in that country, and they are regulated by the government of that country.

In times of political or financial instability, foreign authorities may and often do take actions directly interfering with the local operations of banks. These actions include imposing exchange controls, licensing or restricting payments, closing the banks, and seizing or immobilizing bank assets. When foreign governments take such actions, they frequently prevent branches of U.S. banks from repaying their depositors. This has occurred, for example, in the Soviet Union, China, Cuba, Vietnam, and more recently in the Philippines, Mexico, and Panama.

U.S. banks incur substantial losses when foreign governments assert control over the assets of their foreign branches. In recent years, however, U.S. banks have been confronted with a new and greatly increased risk. After foreign governments have taken control of their branches' assets, U.S. banks have faced claims in U.S. courts that they should use their U.S. assets to repay deposits placed in the foreign branches. Simply put, depositors with the foreign branches have sought to require U.S. banks to compensate them for the foreign government's actions.

The present case graphically illustrates this new risk of liability. This case arises from a savings account in Vietnamese currency (piasters) opened in Vietnam by a Vietnamese citizen. In July 1974, respondent's father deposited piasters with the Saigon branch of Citibank, N.A. ("Citibank/Saigon") and opened a joint passbook savings account in the name of himself and respondent. Respondent's father signed a standard Citibank/Saigon deposit agreement, providing that deposits would be repaid only in piasters and only at Citibank/Saigon. App. at 3a. Under the agreement, Citibank was not responsible for depositor losses resulting from governmental action or other causes beyond Citibank's control. *Id.* The

account paid interest at the annual rate of 19%—more than three times the maximum rate of 5% that respondent could then have earned if the deposit had been placed in dollars with Citibank in the United States. *Id.* at 3a, 27a.

On April 24, 1975, on the eve of the communist takeover in Vietnam, the U.S. government evacuated American citizens and Vietnamese employees of U.S. firms, including Citibank/Saigon. Acting in close coordination with U.S. embassy officials, the remaining Citibank/Saigon personnel turned the branch over to the South Vietnamese central bank. The central bank announced the next day that it would assume all of the branch's deposit obligations. App. at 4a. Less than a week later, Saigon fell to North Vietnamese forces. After declaring victory and confiscating all banks, the North Vietnamese government announced that it would take responsibility for "settlement of debts, deposits, savings and all other sources of capital in the economy." *Id.* at 5a.

In 1984, respondent, who had moved to the United States, sued Citibank in the United States District Court for the Eastern District of Michigan for the value of the piaster deposit plus interest. The district court ruled in favor of respondent after a bench trial. The trial court held that the deposit agreement between respondent's father and Citibank/Saigon had created a payment obligation that ultimately became binding on the Citibank home office when the Saigon branch was evacuated. App. at 39a, 57a. In the court's view, this payment obligation was not excused by the doctrine of *force majeure* because Citibank personnel were evacuated before the branch was forcibly seized by enemy troops; nor was the obligation assumed or seized by the Vietnamese central bank (either before or after the fall of Saigon) because it "left" Vietnam and "sprang" to the United States when the Citibank employees were evacuated. *Id.* at 49a, 50a.

Citibank appealed to the U.S. Court of Appeals for the Sixth Circuit. It argued that it was absolved from liability by the deposit agreement, by *force majeure*, and by Vietnam's assumption of the branch's liabilities; in any event, Citibank argued, the decision of the district court was contrary to United States law. The United States appeared as *amicus curiae* in support of Citibank's position. The government argued that the district court's decision was "contrary to the national interest" and "could affect the safety and soundness of U.S. banks and the U.S. banking system." Brief for the United States as Amicus Curiae at 23, 33, *Trinh v. Citibank, N.A.*, 850 F.2d 1164 (6th Cir. 1988) (No. 86-1258).

A divided panel of the court of appeals affirmed. Although it applied Vietnamese law to construe the deposit agreement and to determine the applicability of *force majeure*, the majority's decision rested fundamentally upon generic common law principles. Thus, the court ruled that neither the deposit agreement nor *force majeure* enabled Citibank to escape application of a "general banking principle" that the home office of a U.S. bank "is *ultimately liable*" for the obligations of its branches. App. at 9a (emphasis in original). It held that "[t]his well-established principle of ultimate liability" renders a U.S. bank liable for a deposit placed in a foreign branch if the branch cannot pay because of "political events." *Id.* The court also relied on a so-called "spring and cling" doctrine—nowhere found in Vietnamese law—under which obligations of a foreign branch are thought to "spring back and cling to the home office" when the branch is closed. *Id.* at 16a, 17a. The majority failed to respond in any way to the argument of the United States government and Citibank that application of these principles conflicted with federal law and policy. Senior Judge Brown dissented.

REASONS FOR GRANTING THE PETITION

This case and a companion case in this Court[3] present a recurring question of critical importance to this Nation's banking system: whether a U.S. bank may be held liable to depositors in its foreign branch when a foreign sovereign prevents the branch from repaying the deposit accounts. Here, it is undisputed that respondent's account was opened in Vietnam by a Vietnamese national, was carried on the books of Citibank's Vietnam branch, was denominated in Vietnamese piasters, and—by the terms of the deposit agreement—was repayable only in Vietnam in piasters. It also is undisputed that Citibank made no express agreement to repay the account in the United States if confiscation or expropriation of the branch's assets prevented repayment in Vietnam; on the contrary, both Vietnamese law and the deposit agreement specifically provided that the depositor bore the risk of *force majeure* (App. at 8a).

Nevertheless, the court of appeals held Citibank liable for the Vietnamese government's acts. This result threatens the long-standing federal banking policy that, absent an express agreement to the contrary, foreign depositors must look to their foreign government—not U.S. banks—for repayment of deposits made at foreign branches when the government prevents the branches themselves from repaying. The decision below collapses the distinction carefully established in federal law between domestic and foreign deposits.

Reflecting these overriding federal concerns, the United States government filed a brief as *amicus curiae* in the court below expressing the unanimous views of the Department of Justice, the Department of the Treasury, the Federal Reserve Board, the Comptroller of the Cur-

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[3] *See Wells Fargo Asia Ltd. v. Citibank, N.A.*, 852 F.2d 657 (2d Cir. 1988). Citibank will file a petition for certiorari in *Wells Fargo* on or before the due date of January 25, 1989.

rency, the Federal Deposit Insurance Corporation, and the Department of State. The United States specifically criticized the court of appeals' "spring and cling" theory and advised the court that imposing liability on American home offices "could affect the safety and soundness of U.S. banks and the U.S. banking system." [4] The Sixth Circuit disregarded the concerns of the United States.

Unless reviewed by this Court, the court of appeals' decision will have a severe impact on United States banks and the federal banking system. The stakes are high; foreign branches now owe more than $200 billion to their depositors. The economic plight of heavily indebted countries and political instability throughout the world increase the risk of adverse foreign government action. This Court should grant certiorari to establish a federal rule that a U.S. bank, unless it has expressly agreed otherwise, may not be held liable for deposits made with its branch in a foreign country when the foreign government prevents the branch from repaying such deposits.

A. Federal Law and Policy Establish That a U.S. Bank May Not Be Held Liable for Deposits Made with Its Branch in a Foreign Country When the Foreign Government Prevents the Branch from Repaying Such Deposits.

The decision below threatens two fundamental federal banking policies. First, since the enactment of the Federal Reserve Act in 1913, federal banking policy has vigorously promoted the establishment of foreign branches of U.S. banks "for the furtherance of the foreign commerce of the United States, and to act if required to do so as fiscal agents of the United States." 12 U.S.C. § 601 (1982). Second, federal banking policy is designed to ensure the safety and soundness of the U.S. banking system.

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[4] Brief for the United States as Amicus Curiae at 33, *Trinh*, *supra*.

To further these policies, federal law has long distinguished between the regulation of U.S. banks and their foreign branches. The core of this distinction is a basic principle—exactly the opposite of the rule relied on by the court of appeals—that the depositor in a foreign branch of an American bank bears the risk that repayment of the account may be prevented by acts of the government of the foreign country in which the branch is located.[5]

The distinction is reflected in a number of specific federal statutes and regulations. First, domestic deposits are subject to a reserve requirement that directs banks to set aside a certain percentage of their assets and prohibits the use of such funds for loans or other investments. By contrast, the Federal Reserve Board has consistently concluded that foreign deposits payable solely abroad are exempted from the reserve requirement. *See* 4 Fed. Res. Bull. 1123 (1918); 35 Fed. Reg. 2768 (1970); 1 Fed. Res. Reg. Serv. at ¶ 2-330 (Staff Op., Feb. 23, 1982); *id.* at ¶ 2-330.01 (Staff Op., Mar. 21, 1983); *id.* at ¶ 2-330.1 (Staff Op., July 29, 1983). As the Board has explained, this exclusion rests on the principle that the foreign depositor, rather than the United States bank, bears the risk that a foreign government will interfere with the foreign branch (35 Fed. Reg. 2768):

> [A] customer who makes a deposit that is payable solely at a foreign branch assumes whatever risk may exist that the foreign country might impose restrictions on withdrawals.

In 1980, Congress amended the Federal Reserve Act to incorporate the Federal Reserve Board's long-standing interpretation (12 U.S.C. § 461(b)(6) (1982)), stating

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[5] This general principle is subject to a recognized exception that U.S. banks may guarantee that deposits with their foreign branches may be paid in the United States. The scope of that exception, which is not involved in this case, is at issue in Citibank's companion petition in the *Wells Fargo* case. *See* note 3, *supra*.

that the "express . . . intent of the legislation [is] not to disturb the classifications as between domestic and foreign deposits which have been developed under existing law." H.R. Rep. No. 263, 96th Cong., 1st Sess. 10 (1979).

Second, domestic deposits—but not foreign branch deposits—are covered by the federal deposit insurance program and are included in the assessments banks pay for FDIC insurance. *See* 12 U.S.C. § 1813(*l*)(5)(A) (1982). The FDIC system is part of the federal "safety net" for domestic depositors in the event of the insolvency of an American bank, and is not intended to insure deposits payable abroad.

Third, Congress and the Federal Reserve Board have recognized the need to take very different approaches to foreign branches of U.S. banks in response to the local business environment in which such branches operate. Thus, when U.S. banks were limited in the rate of interest they could pay on domestic deposits, Congress and the Federal Reserve Board exempted deposits made with foreign branches of U.S. banks. *See, e.g.*, 12 C.F.R. § 217.0(c) (1975). Similarly, Congress has authorized foreign branches of U.S. banks to engage in various activities abroad that may not be permitted in the United States. *See* 12 U.S.C. § 604a. (1982).

In addition to furthering federal banking policies, the differences between regulations for U.S. banks and for their foreign branches reflect the understanding that the branches function like other banks in the foreign country and are primarily regulated by the governments of the countries where they operate. Foreign governments are responsible for authorizing the establishment and regulating the day-to-day operations of foreign branches including matters such as permissible activities, reserve requirements, and closure. In the present case, for example, the government of South Vietnam extensively regulated Citibank's Saigon branch, requiring that the

branch keep specified reserves in the country (App. at 2a), that it be operated as a branch rather than as a subsidiary of Citibank (*id.*), that it be maintained as a separate entity with assets, funds, books, and records segregated from all other Citibank operations (*id.*), and that it hold all of its assets in piasters (*id.*). More generally, this allocation of regulatory authority to the countries where foreign branches are located is consistent with the understanding among bank regulators around the world.[6]

The court of appeals' decision in this case runs roughshod over the differences between U.S. banks and their foreign branches that have been so carefully established in federal law and regulation, as well as in the international sphere. Simply stated, the United States banking system and federal safety net provide domestic depositors with a high degree of security but at rates of return that reflect the cost of that security. In contrast, the depositor abroad takes whatever the foreign market offers, including opportunities for higher returns subject to the risks of political and economic instability. In effect, the decision below gives the depositor abroad the best of both: the safety and soundness of the American banking system and the better rates available because of the market conditions and risks prevailing in the foreign market.

By collapsing the distinction between U.S. banks and their foreign branches, the decision of the court of appeals substantially impairs the federal banking policies underlying the distinction. The Sixth Circuit has com-

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[6] *See, e.g.*, Basle Concordat (May 1983), *reprinted in* 22 Int'l Legal Materials 901 (1983) (App. I at 68a); Dale, *The Regulation of International Banking* 171-94 (1984). The Basle Concordat is an agreement of the central bank governors of the "Group of Ten" major industrialized nations (the United States, the United Kingdom, Canada, France, Germany, Italy, the Netherlands, Belgium, Sweden, and Japan) concerning supervision of international banks.

promised the safety and soundness of the U.S. banking system by shifting the risk of foreign governmental interference with foreign deposits from depositors abroad to banks in the United States. As a result, U.S. banks face hundreds of billions of dollars in foreign branch liabilities, thereby exposing the U.S. banking system and the governmental resources supporting that system to potentially massive demands for which no provision has been made.[7] As the government warned in its *amicus* brief below (at 33), allowing foreign governments to impose these liabilities on our banking system will place "unwarranted and unforeseeable strains on the [federal banking] framework."[8]

By imposing significant new risks on U.S. banks the court of appeals' decision also frustrates congressional policy to encourage foreign branch operations. Thus, the U.S. government's *amicus* brief in the companion case (at 34) explained that if foreign governments are permitted to seize or immobilize the assets, but not the liabilities, of foreign branches, U.S. banks will face a "double loss": "a first time when the assets of foreign

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[7] As noted above, deposits with the foreign branches of U.S. banks total some $225 billion. *See* Department of Treasury, *National Treatment Study: Report to Congress on Foreign Government Treatment of U.S. Commercial Banking and Securities Organizations (1986) Update*) at 20; Brief for the United States as Amicus Curiae at 2, *Wells Fargo, supra.* Substantial amounts of this figure reflect deposits in areas where the risk of economic or political instability is not insignificant. For example, U.S. banks are estimated to owe some $3 billion in Panama, while Citibank branches alone owe over $300 million in foreign currency-denominated obligations in the Philippines.

[8] The government went on to explain that decisions such as that below "could lead a bank with heavy losses to request financial assistance from the credit facilities of the Federal Reserve System as 'lender of last resort,' [and] . . . could conceivably lead . . . to calls on the insurance fund of the FDIC, thus increasing the costs to the FDIC in the event of a bank failure." Brief for the United States as Amicus Curiae at 34, *Trinh, supra.*

branches are expropriated; and a second time when the claims of foreign depositors against the home office are upheld." These risks will inevitably serve as powerful disincentives for U.S. banks to establish or continue to maintain foreign branches wherever instability may arise.[9]

In sum, the court of appeals' decision imports the effects of sovereign interference from foreign countries and imposes them on United States banks and the United States banking system. That result is a serious distortion of the federal regulatory scheme, a windfall for foreign depositors and their foreign governments, and an inequitable imposition of double liability on U.S. banks. Fortunately, such untoward consequences need not be countenanced. For, as we now show, federal law and policy require a uniform federal rule that U.S. banks are not liable for the risk of foreign sovereign actions preventing or restricting payment of foreign deposits.

B. A Uniform Federal Rule of Decision Governing the Liability of United States Banks to Foreign Branch Depositors Is Necessary To Fulfill Federal Banking Policies.

A uniform rule of federal law is necessary here in order to effectuate the foregoing federal policies and to provide a national standard governing the liability of U.S. banks to depositors in their foreign branches. Whether that rule is found in pre-emptive federal statutes and regulations,[10] or whether it is a matter of fed-

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[9] *See* Brief for the United States as Amicus Curiae at 2, 11, 20, *Wells Fargo*, *supra* (emphasizing magnitude of disincentives to foreign branch operations).

[10] *See* 12 U.S.C. § 461(b)(6) (1982) and 35 Fed. Reg. 2768 (1970), discussed at pp. 7-8 *supra*. Because federal statutes and regulations establish the principle that U.S. banks are not responsible for the actions of foreign sovereigns, the court of appeals' decision reaching a contrary conclusion "stands as an obstacle to the

eral common law necessary to further federal policies and promote uniformity, the question of U.S. bank liability must be subject to a federal rule of decision that displaces inconsistent state or foreign law.

There can be no doubt about the "need and authority" in this case for federal courts to fashion such a rule as a matter of federal common law. *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981). Just last Term, in *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510, 2514 (1988), this Court reiterated that federal common law is appropriate in areas involving "uniquely federal interests." Where "a 'significant conflict' exists between an identifiable 'federal policy or interest and the [operation] of state law' " (*id.* at 2515), the federal policy must prevail.

Moreover, the Court has held that federal common law displaces state law rules where "a uniform national rule is necessary to further the interests of the Federal Government . . . ." *Miree v. DeKalb County*, 433 U.S. 25, 29 (1977). *See United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979). Where "there is an overriding federal interest in the need for a uniform rule of decision," this Court repeatedly has fashioned a single federal standard. *Illinois v. City of Milwaukee*, 406 U.S. 91, 105 n.6 (1972). *See Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943).

1. *Protecting federal interests.* Congress and the Federal Reserve Board have expressed powerful federal policies governing the relation of foreign branches to the domestic banking system. These statutory and regulatory provisions reflect the constitutional authority of the United States over foreign commerce and foreign affairs,

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accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *see also Schneidewind v. ANR Pipeline Co.*, 108 S. Ct. 1145, 1150-51 (1988).

as well as over our federal banking system.[11] Federal law and policy plainly require that U.S. banks and the U.S. banking system not be made to answer when foreign sovereigns take actions preventing or restricting the ability of foreign branches to repay deposits made by depositors in that banking system.[12]

Both Citibank and the United States government explicitly called these important federal interests to the court of appeals' attention. The court below, however, ignored those interests and decided the case based on its own determination of "which . . . part[y] is to suffer the loss." App. at 17a. For the reasons discussed in detail above (at 10-12), that decision, "significantly conflicts" with vital federal policies. *Boyle*, 108 S. Ct. at 2515.

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[11] *See, e.g., Boyle*, 108 S. Ct. at 2516 n.4 (there is a "distinctive federal interest in . . . 'the exterior relation of this whole nation with other nations and governments' "); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979) ("[f]oreign commerce is preeminently a matter of national concern").

This Court has recognized that similar considerations of federal responsibility and national uniformity require the application of federal common law in related areas such as the act of state doctrine. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). Courts of appeals have held that federal common law governs the situs of a debt for purposes of determining the legal consequences of a foreign sovereign's acts. *See Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1122 (5th Cir. 1985); *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*, 392 F.2d 706, 715 (5th Cir.), *cert. denied*, 393 U.S. 924 (1968); *Republic of Iraq v. First Nat'l City Bank*, 353 F.2d 47, 50-51 (2d Cir. 1965) (Friendly, J.), *cert. denied*, 382 U.S. 1027 (1966).

[12] The decision below conflicts with federal policy for another reason as well. The court of appeals held that Citibank was liable to respondent because it closed its Saigon branch—and as a result caused the debt to "spring back" to the United States—just before revolutionary Vietnamese forces confiscated the branch's assets. App. at 15a, 16a. Accordingly, as the United States noted in its *amicus* brief below (at 23), the court's ruling "has the illogical and dangerous effect of encouraging an American bank to keep a foreign branch open, despite great risk to its employees, until the branch is physically seized by enemy soldiers."

The conclusion that federal common law supplies the rule of decision is buttressed by 12 U.S.C. § 632 (1982), which provides that suits involving federally chartered banks and relating to foreign banking "shall be deemed to arise under the laws of the United States, and the district courts of the United States shall have original jurisdiction of all such suits." As the Court has observed, a provision such as this can be "a proper basis for the development of judge-made rules." [13]

2. *National uniformity.* The liability of U.S. banks for foreign sovereign interference with foreign branch deposits must be subject to a uniform national rule. Both banks and federal banking regulators need predictability and consistency in the governing legal principles. It would be intolerable if the liability of U.S. banks for foreign sovereign acts were to vary according to the vagaries of local laws in 50 states and dozens of foreign countries—laws that often cannot be reliably determined until the foreign sovereign has acted and an adjudication actually rendered.

Left to apply principles of ordinary contract and banking law, the state and lower federal courts are incapable of developing a uniform rule. They have adopted a wide range of inconsistent analytical approaches and, more importantly, conflicting and confusing legal standards concerning who should be held responsible for

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[13] *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 96 (1981). *See Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957); *D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*, 315 U.S. 447, 467-68 (1942) (Jackson, J., concurring) ("[t]hat this ['arising under'] provision is not merely jurisdictional is suggested by the presence in the same section of the Act of the separate provision [establishing federal court jurisdiction]"). *But see Edelmann v. Chase Manhattan Bank, N.A.*, 856 F.2d 322, 325-26 n.14 (1st Cir. 1988), in which the court of appeals, ignoring the plain language of the statute, refused to read Section 632 to support the development of substantive federal common law rules.

foreign sovereign interference. The confusion in the lower courts stems in part from their uncertainty over the source of the law to be applied. Some courts have applied the law of the state where the U.S. bank is headquartered.[14] Others have applied the law of the foreign country where the deposit was taken.[15] One court has split the difference, applying the law of the forum state to determine the basic deposit obligation and foreign law to resolve the U.S. bank's affirmative defense of impossibility of performance.[16] And yet another court has applied federal law, but only in the form of the act of state doctrine, to determine the U.S. bank's liability for foreign branch deposits where a foreign sovereign seized the branch and its assets.[17]

The state and lower federal courts also are divided over the substance of the governing law. Thus, a number of courts (including the court below) have invoked the "general banking principle" (App. at 9a) imputing liability to the bank for the obligations of its branches because they are not separate corporate entities.[18] Other

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[14] *Edelmann v. Chase Manhattan Bank, N.A.*, 856 F.2d 322 (1st Cir. 1988); *Sokoloff v. National City Bank*, 239 N.Y. 158, 145 N.E. 917 (1924), *on remand*, 130 Misc. 66, 224 N.Y.S. 102 (Sup. Ct. 1927), *aff'd without opinion*, 223 A.D. 754, 227 N.Y.S. 907, *aff'd*, 250 N.Y. 69, 164 N.E. 745 (1928).

[15] App. at 10a; *Trujillo-M v. Bank of Nova Scotia*, 51 Misc.2d 689, 273 N.Y.S.2d 700 (Sup. Ct. 1966), *aff'd without opinion*, 29 A.D.2d 847, 289 N.Y.S.2d 398, *cert. denied*, 393 U.S. 982 (1968); *Dougherty v. National City Bank*, 157 Misc. 849, 285 N.Y.S. 491 (Sup. Ct. 1935).

[16] *Vishipco Line v. Chase Manhattan, N.A.*, 660 F.2d 854 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982).

[17] *Perez v. Chase Manhattan Bank, N.A.*, 61 N.Y.2d 460, 463 N.E.2d 5, 474 N.Y.S.2d 689, *cert. denied*, 469 U.S. 966 (1984). *See also Garcia v. Chase Manhattan Bank, N.A.*, 735 F.2d 645 (2d Cir. 1984) (federal act of state doctrine inapplicable).

[18] *Vishipco Line v. Chase Manhattan Bank, N.A.*, 660 F.2d 854 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982); *Sokoloff v. Na-*

courts have emphasized the separateness of bank branches from the home office, concluding that the U.S. bank is not to be held liable for foreign branch deposits seized by a foreign government.[19] But even those courts that accept the foreign branch as a "separate entity" have developed conflicting standards on whether the parties by agreement have changed the "situs" of the deposit obligation and thereby altered the general rule requiring payment only by the branch.[20]

This disarray among the state and lower federal courts on the relationship of foreign branches to the U.S. banking system demonstrates the compelling need for a uniform federal rule. Indeed, given the powerful federal interests at stake and the utter lack of uniformity, it should come as no surprise that the United States, in its *amicus curiae* brief in the related *Wells Fargo* case, recognized the applicability of federal common law to the issue of home office liability. As the government explained, cases such as this

> implicate the application of federal banking law to issues affecting this country's relationships with other members of the international banking community. In these instances, our federal system may require application of federal common law rules . . .

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tional City Bank, 239 N.Y. 158, 145 N.E. 917 (1924), *on remand*, 130 Misc. 66, 224 N.Y.S. 102 (Sup. Ct. 1927), *aff'd without opinion*, 223 A.D. 754, 227 N.Y.S. 907, *aff'd*, 250 N.Y. 69, 164 N.E. 745 (1928).

[19] *Dougherty v. National City Bank*, 157 Misc. 849, 285 N.Y.S. at 502-03. *See also Clare & Co. v. Dresdner Bank*, [1915] 2 K.B. 576, 577-78.

[20] *Compare Edelmann v. Chase Manhattan Bank, N.A.*, 856 F.2d at 326-33; *Wells Fargo Asia Ltd. v. Citibank, N.A.*, 852 F.2d at 660-61; *and Garcia v. Chase Manhattan Bank, N.A.*, 735 F.2d at 650, *with Trujillo-M v. Bank of Nova Scotia*, 51 Misc.2d 689, 273 N.Y.S.2d at 704-05; *and Perez v. Chase Manhattan Bank, N.A.*, 61 N.Y.2d 460, 463 N.E.2d 5, 474 N.Y.S.2d at 692-93.

> [citing federal common law decisions in *Texas Industries, Inc., v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); and *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943)].
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> * * * *
>
> We therefore urge that, as a matter of U.S. law and policy, a depositor making a deposit at a foreign branch—and in the absence of an explicit guarantee by the head office—must assume the sovereign risk that the foreign country will restrict repayment.[21]

In short, the problem presented in this case can only be addressed satisfactorily by a federal common law rule. Consistent with federal law and policy, this rule should provide that a U.S. bank, unless it has expressly agreed otherwise, may not be held liable for deposits made with its branch in a foreign country when the foreign government prevents the branch from repaying such deposits.

C. The Issue of United States Bank Liability to Foreign Branch Depositors Presents an Important and Recurring Question of Federal Law that Warrants this Court's Review.

As discussed above, and as the government explained in its *amicus curiae* brief in the court of appeals, the decision below has dangerous implications for U.S. banks and the U.S. banking system. The court of appeals' ruling will impair the competitiveness of American banks in foreign markets and discourage the operation of foreign branches in many countries of the world. What is more, the ruling creates severe and unanticipated risks for the U.S. banking system and government resources that provide a federal safety net.

Given the magnitude of foreign branch deposits, these increased risks are a matter of the utmost public impor-

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[21] Brief for the United States as Amicus Curiae at 11-12 n.7, 22, *Wells Fargo, supra*.

tance. Unfortunately, foreign governments do expropriate or impose payment restrictions that affect deposits with foreign branches of U.S. banks. Recent events in Vietnam, Panama, and the Philippines attest that foreign interference is today a substantial and recurring concern for American banks doing business abroad. The economic plight of heavily indebted countries and political instability throughout the world increase the likelihood of additional interference.

Experience has demonstrated that the lower courts are incapable of adopting a consistent approach to the issue of home office liability, let alone one that protects federal banking policies. A decision by this Court announcing a uniform federal rule is necessary to resolve the issue and provide clarity for bank management and federal regulators.

The threat to federal banking policy posed by the court of appeals' decision is not diminished by the court's suggestion that U.S. banks could "seek to limit by contract the extent of their exposure to . . . liability." App. at 12a. To begin with, this proposal, even if workable prospectively, cannot provide a solution for the more than $200 billion in foreign deposits that currently are outstanding. Nor is it workable prospectively. As the *Wells Fargo* case demonstrates, there are thousands of international banking transactions each day where market conventions do not permit the bank to use individualized contract language. And even where contract language could be inserted, the court of appeals' suggestion ignores both the hostility that courts have shown to exculpatory provisions in bank deposit agreements and the confused state of the law. For example, the court below, while suggesting that some exculpatory clauses might be effective, nevertheless construed the explicit *force majeure* clause in this case not to apply (ostensibly because Citibank "voluntarily" closed its branch in the face of an imminent invasion by a communist army). In contrast,

the Second Circuit stated in *Vishipco* that the enforceability of any form of exculpatory clause would be "problematic" for U.S. banks operating through foreign branches. *Vishipco*, 660 F.2d at 863. Given this confusion, only a uniform rule of federal law can provide reliable guidance for regulators and the parties.

Nor is the court of appeals' implicit suggestion (App. at 13a) that American banks should operate abroad through subsidiaries rather than branches realistic. Although federal statutes authorize U.S. banks to own foreign bank subsidiaries, federal policy has always favored the use of branches and contemplated the establishment of subsidiaries only where branches would not be feasible.[22] In any event, many foreign governments—including Vietnam in the present case—require United States banks to operate through local branches and do not permit local bank subsidiaries to be wholly owned by foreign banks. App. at 2a.

Thus, notwithstanding the court of appeals' attempts to minimize the practical significance of its ruling, it is clear that the decision below will cause significant harm to U.S. banks and U.S. regulatory interests. The Solicitor General, appearing *amicus curiae* at the Court's invitation in *Vishipco*, agreed that the issue is one of substantial public importance that:

- "has significant practical implications" and "implicates the interests of federal regulatory agencies responsible for oversight of the American banking industry" (U.S. Am. Br. at 7-8);
- "has significant implications for the Board of Governors of the Federal Reserve System . . . and for the Federal Deposit Insurance Corporation" (*id.* at 8); and

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[22] *See* H.R. Rep. No. 408, 66th Cong., 1st Sess. 1 (1919); H.R. Rep. No. 447, 64th Cong., 1st Sess. 2 (1916).

- "raises serious concerns about the protection of American citizens and investment overseas" (*id.* at 9).

The Sixth Circuit's decision in this case presents these federal concerns.[23] The issue is now ripe for decision. Its overriding importance and the continuing failure of the lower courts adequately to resolve the issue are compelling indications of the need for the Court to grant this petition.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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December 20, 1988

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[23] Although the Court denied certiorari in *Vishipco*, the sole question presented in that case related to the act of state doctrine, which the Solicitor General concluded was not implicated by the lower court's decision. Brief for the United States as Amicus Curiae at 7, *Vishipco*, *supra*. *See* Brief for the United States as Amicus Curiae at 8, *Trinh*, *supra* (distinguishing posture of present case from that of *Vishipco*).

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

No. 86-1258

NGOC QUANG TRINH

versus

CITIBANK, N.A.

July 8, 1988

John E. Jacobs (Lead Counsel), Mason, Steinhart & Jacobs, P.C., Southfield, Mich., John E. Hoffman, Sherman & Sterling, New York, N.Y., for defendant-appellant.

Lawrence John, Detroit, Mich., for plaintiff-appellee.

Anthony J. Steinmeyer (Lead), Marc Richman, Appellate Staff, Civ. Div., Dept. of Justice, Washington, D.C., James M. Spears, for amicus curiae, United States.

Appeal from the United States District Court
for the Eastern District of Michigan

Before KEITH and JONES, Circuit Judges, and BROWN, Senior Circuit Judge.

NATHANIEL R. JONES, Circuit Judge:

Introduction

Defendant-appellant Citibank, N.A. ("Citibank") appeals from a judgment holding it liable to plaintiff-appellee Ngoc Quang Trinh ("Trinh") for payment on Trinh's savings account in Citibank's former branch bank in Saigon, South Vietnam. The district court, relying primarily on *Vishipco Line v. Chase Manhattan Bank*, 660 F.2d 854 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982), concluded that the home office of the Saigon branch of Citibank was liable on deposits placed in the foreign branch when the branch was forced to close in 1975 as a result of the impending overthrow of Saigon by revolutionary forces. *Trinh v. Citibank*, 623 F. Supp. 1526 (E.D. Mich. 1985). In effect, the lower court placed the risk of loss arising from a political revolution on the domestic home office of the American bank rather than on the individual depositors. Because we agree that this is precisely where the risk of loss belongs—and because neither the deposit agreement construed in light of the Vietnamese law of *force majeure* nor the affirmative defense asserted by Citibank convinces us otherwise—we affirm the judgment of the district court.

I.

Citibank is an international banking corporation based in New York with branch offices all over the world. Prior to 1975, it operated a branch in Saigon, South Vietnam known as Citibank Saigon. Under Vietnamese law, Citibank could not have operated in Vietnam through a separate corporation or subsidiary; Citibank was limited to operating as a branch. Moreover, Vietnamese law required that a branch maintain all of its assets in the local currency and keep all the branch's capital, assets, funds, books and records separate and apart from those of the home office. Vietnamese law also required that branch banks have a paid-in capital reserve equal to a certain percentage of its customer's deposits and that this

capital be earmarked and transferred to the branch *by the home office.*[1]

On July 25, 1974, plaintiff's father, Quang Quy Trinh, a retired senator in the South Vietnamese government, opened a joint savings account at Citibank Saigon in his name and that of his son. The account paid annual interest at a rate of 19% compounded daily. At the time Trinh's father opened the account, Trinh was a student residing in Michigan. He became a United States citizen in 1979 and has never returned to Vietnam.

The deposit agreement governing the account provided that "withdrawals [would] be permitted only at Citibank's place of business"—which was designated as "28-30 Nguyen Van Thinh, Saigon 1, Republic of Vietnam"—and that deposits were payable only in Vietnamese piasters. The agreement further provided as follows:

> Citibank does not accept responsibility for any loss or damage suffered or incurred by any depositor resulting from government orders, laws . . . or from any other cause beyond its control.

J. App. at 126.

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[1] Article 26 of Decree Law 18 provides as follows:

> The Vietnam branch of a foreign bank—. . . the headoffice [of the foreign bank] must clearly earmark and transfer to the branch in Vietnam a capital commensurate with the conditions stipulated in articles 12 & 13 of this Decree Law.

J. App. at 136 (brackets in original). Articles 12 and 13 state in pertinent part:

> *Article 12.* Each bank in Vietnam shall have a fully paid-in capital the minimum amount of which shall be determined for each type of bank by the Administrative Council of the National Bank . . . .
>
> *Article 13* . . . 1) The total of the capital already paid-in, the reserve amount and the undistributed profits of each bank shall always be maintained at a minimum percentage of the amount of deposits of its customers. . . .

J. App. at 134.

In early April 1975, the situation in Saigon was becoming desperate as the North Vietnamese forces closed in on the city. During this period, American embassy officials met often with the branch officers of the American banks in Saigon to consider what actions should be taken to protect the safety of employees, both American and Vietnamese. These meetings produced a contingency plan for emergency evacuation. During this time, the branch bank encouraged concerned depositors to withdraw their money, although the situation did not safely allow for the posting of formal notices suggesting such withdrawals.

On April 24, 1975, on the eve of Saigon's fall to the North Vietnamese, Citibank closed its Saigon branch, and its personnel left the city in conjunction with the general evacuation of American citizens and Vietnamese employees planned by the United States Embassy. All of the branch's documents, files, records, and books were left in the branch. Cash from the branch, as well as the branch's keys, vault combination, and official documents, were entrusted to embassy officials with a request to turn them over to the National Bank of Vietnam, South Vietnam's central banking authority.

The following day, on April 25, 1975, the South Vietnamese government issued a joint communique stating that Citibank, and two other American banks, had "closed temporarily without asking for permission"; that these banks would be sanctioned; and that the National Bank and the Finance Ministry guaranteed to return all the money legally deposited.

Less than one week later, on April 30, 1975, the South Vietnamese government in Saigon fell. On May 1, 1975, the new revolutionary administration of Vietnam declared victory and confiscated all banks. Thus, all Saigon banks, including Citibank's branch, were "placed under

the management of the Saigon-Gio Dinh Military Management Committee banking committee," and their operations suspended. The National Bank of Vietnam, the central bank, reopened under North Vietnamese control, and over the course of several weeks made a number of announcements concerning its plans for the future. Specifically, the central bank announced:

> The Vietnam National Bank . . . is ready to recover former debts incurred by banks through lending and to conduct settlement of debts, deposits, savings and all other sources of capital in the economy.

J. App. at 152. It was further announced that:

> [T]he national bank guarantees that the savings accounts of workers, who legitimately earn their income through their own efforts and labor, will gradually be paid to them. . . .
>
> . . . .
>
> As regards banks whose owners have fled the country, the national bank will inventory and re-evaluate their assets and settle their accounts in order to determine their ability to return the savings of account holders. . . .

Id. at 156-57.

Shortly after the fall of Saigon, plaintiff's father was placed in a reeducation camp. After his release in 1980, he sent the Citibank Saigon passbook to his son in Michigan. In May 1980, Trinh called the International Division of Citibank in New York to inquire about the deposit. Trinh was told that the National Bank of Vietnam was now responsible for the deposit. On November 5, 1980, Trinh wrote to Walter Wriston, Chairman of Citibank, expressing dissatisfaction with this reply, and was again told that the National Bank was responsible for the deposit. This lawsuit was commenced in the Eastern District of Michigan on June 14, 1984.

Applying Vietnamese law, the district court found in favor of Trinh. *Trinh v. Citibank*, 623 F. Supp. 1526 (E.D. Mich. 1985). As mentioned, the court relied primarily on Judge Mansfield's opinion in *Vishipco*, where on similar facts, the Second Circuit found the Chase Manhattan Bank liable to depositors in its former Saigon branch. In this respect, the court concluded that the deposit agreement with Trinh formed an underlying basis for recovery against the bank and that, as in *Vishipco*, the Vietnamese law of *force majeure* did not relieve Citibank of its liability on that deposit. 623 F. Supp. at 1532. Although the court recognized that in *Vishipco* the underlying obligation had been construed under New York law, as opposed to Vietnamese law, the court did not find this distinction to be significant. *Id.* In the first place, the court noted that Citibank never argued that, under Vietnamese law, Trinh's deposits did not equal a debt of the bank or form an underlying basis for recovery. Moreover, since the *Vishipco* court *did* apply Vietnamese law to the argument that *force majeure* relieved the bank of liability—the same argument that Citibank makes here—the fact that it addressed this argument as an affirmative defense to liability (rather than as a threshold basis for denying recovery on the underlying obligation) was not, the court believed, the basis for a meaningful distinction. *Id.*

The court then stated that, even if it accepted Citibank's proposition that the doctrine of *force majeure* was incorporated into the bank's underlying obligation on the deposits, the application of that doctrine to these facts would nevertheless not relieve Citibank of liability. *Id.* at 1533. Specifically, the court reasoned that Citibank's decision to close its Saigon branch was a matter of "voluntary choice," not an act of God, act of government, or "fortuitous cause beyond its control," as required by Vietnamese law. *Id.* at 1533-34.

Further, the court rejected Citibank's argument that Citibank Saigon had been nationalized by the revolutionary government and that the National Bank of Vietnam was its successor in interest. *Id.* at 1534. The court concluded that the argument failed for two reasons. First, the court found that the *situs* of the deposit was no longer Vietnam at the time the expropriation took place because it had "spr[ung] back" to the head office of Citibank when Citibank Saigon was voluntarily closed. *Id.* at 1536. Second, the court found that Citibank had failed to prove that the Vietnamese government had clearly assumed the liabilities as well as the assets of Citibank Saigon. *Id.* at 1534-35. Accordingly, the district court ordered Citibank to pay Trinh the dollar value of his account, $1403.67, plus prejudgment interest of $1792.69, for a total of $3196.36.

II.

A.

Citibank's primary argument on appeal is that the deposit agreement construed under Vietnamese law [2] places the risk of loss for a political revolution on the depositor not on the domestic home office. In this respect, the bank points to the express terms of the agreement, signed by Trinh's father, which provides both that "Citibank does not accept responsibility for any loss or damage suffered or incurred by any depositor resulting from government orders, laws . . . or from any other cause beyond its con-

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[2] We agree with the district court that the law of Vietnam applies to this case. Generally, as the lower court explained, a court must apply the law of the forum with the most significant contacts with the case, the law where the contract was made, or the law where the branch was located. *See, e.g., Zimmerman v. Sutherland*, 274 U.S. 253 (1927); *Aaron Ferer & Sons, Ltd. v. Chase Manhattan Bank*, 731 F.2d 112 (2d Cir. 1984). Here, all of the indicators point to a conclusion that Vietnamese law applies. Plaintiff's citizenship was Vietnamese, and his father, Citibank Saigon, the banking relationship, the banking transactions, and the account currency were all located in Vietnam.

trol," and that payment on accounts would be made only in Vietnam and only in piasters. In the bank's view, these provisions of the agreement create an implicit distinction between *credit* risk and *sovereign* risk, with the bank bearing only the former. Thus, where a branch is unable to pay its depositors as a result of, for instance, financial mismanagement, robbery, or insolvency—the typical kinds of economic or credit risks normally assumed by companies doing business internationally—Citibank concedes that the home office would be liable for the deposits because, in such circumstances, payment could nevertheless be made in Vietnam and in piasters. However, where, as here, revolutionary conditions make payment in Vietnam in piasters impossible, Citibank believes that, under the deposit agreement, the depositor, not the domestic home office, must bear the loss.

The bank argues that its intention to create an implicit distinction between credit risk and sovereign risk is suggested, not only by the plain terms of the agreement, but also by a construction of those terms in light of applicable Vietnamese commercial law. More specifically, the bank argues that it should be presumed that the parties intended for their agreement to be consistent with the Vietnamese law of *force majeure*,[3] which, according to the testimony of the bank's Vietnamese law expert, placed the risk of loss on the depositor in the unique circumstances presented here.

For these reasons, Citibank contends that the only reasonable expectation of depositors was to receive piasters at Citibank Saigon. In the bank's view, by allowing the

[3] Article 701 of the Vietnamese Commercial Code (V.C.C.) provided: "The debtor does not have to pay damages if his violation or non-performance of contractual obligations is due to a fortuitous cause or case of *force majeure*."

Article 1206 of the V.C.C. provided: "The depositary is not liable for accidents or risks resulting from *force majeure*, unless previously he had been given notice to return the deposited objects."

plaintiff to recover, the district court effectively re-wrote key provisions of the deposit agreement and, further, gave the depositor something he could not have gotten—and could not have expected to get—under that agreement construed in light of Vietnamese law: United States dollars in the United States at a rate of interest (19%) which would have been illegal for Citibank to pay under U.S. law.

We are not persuaded by the bank's arguments. In the first place, as the district court correctly recognized, it is a general banking principle that the home office is *ultimately liable* on a deposit placed in its foreign branch if, as here, the branch closes or otherwise wrongfully refuses to return a deposit. *Sokoloff v. National City Bank*, 130 Misc. 66, 73, 224 N.Y.S. 102, 114 (N.Y. Sup. Ct. 1927); *see also Bluebird Undergarment Corp. v. Gomez*, 139 Misc. 742, 249 N.Y.S. 319 (City Ct. N.Y. 1931); Heininger, *Liability of U.S. Banks for Deposits Placed in Their Foreign Branches*, 11 Law & Pol. Int'l Bus. 903, 926 (1979). This well-established general principle of ultimate liability is not inconsistent with Citibank's assertion that a branch bank is a separate and distinct business entity. *See* Brief of Citibank at 30-32. To this end, the bank is surely correct in arguing that absent special circumstances, deposits made in branch banks are payable only there. *Id.* (citing *Bluebird Undergarment Corp. v. Gomez*, 139 Misc. 742, 249 N.Y.S. 319 (City Ct. N.Y. 1931)). However, as we read *Sokoloff*, *Bluebird* and similar cases, one of the "special circumstances" triggering liability against the home office *is* the *closing of a branch*. *Bluebird*, 249 N.Y.S. at 321-22. Thus, while it is true that the payment obligation exists *primarily* between the branch bank and the depositor, the *ultimate* obligation on the deposits remains with the home office. *Id.*; *Vishipco*, 660 F.2d at 863; *see also* Annotation, *Branch Banks*, 136 A.L.R. 471, 493-97 (1942).

That the home office of the branch was to be ultimately liable for the deposits of its foreign customers is further suggested, we think, by the Vietnamese laws under which foreign banks operated. These laws permitted foreign banks to operate only through branches, and required the home office of a branch to "clearly earmark *and transfer to the branch* in Vietnam" an amount of capital equal to a certain percentage of the branch's deposits. *See supra* at note 1. The home office was required to maintain this paid-in reserve amount at its proper level, and so as deposits increased, transfers to the branch would increase as well. In our view, by prohibiting foreign banks from operating through locally incorporated subsidiaries, and by requiring parent banks to maintain paid-in capital reserves at their Vietnamese branches. Vietnamese law sought to remove any ambiguity as to where the responsibility would ultimately lie for the liabilities of branch banks. In this respect, South Vietnam furthered its national policy, as recognized by the court in *Vishipco*, of enabling "those depositing in foreign branches to gain more protection than they would have received had their money been deposited in locally incorporated subsidiaries of foreign banks." *Vishipco*, 660 F.2d at 863.

While not denying that in some circumstances the home office would be ultimately liable for deposits placed in its foreign branch, Citibank argues that in this case the deposit agreement construed under Vietnamese law limits the home office's ultimate liability to only those situations in which the branch's failure to pay is the result of *credit*, as opposed to sovereign, risks. More specifically, as outlined above, Citibank concedes that the home office would be liable under the deposit agreement if the branch's failure to pay was the result of insolvency, financial mismanagement, or any other circumstance in which payment could still be made in Vietnam and in piasters. The bank maintains, however, that it is not

liable under the agreement where, as here, political events have made payment in Vietnam in piasters impossible. We are not persuaded that such a distinction is evident here or that one is required by application of the Vietnamese law of *force majeure*.

By operating a branch office in Vietnam, Citibank indicated to its foreign depositors that it accepted the risk that, in at least some circumstances, it would be liable elsewhere for obligations incurred by its branch. *Vishipco*, 660 F.2d at 863. In so doing, it "reassure[d] [those] depositors that their deposits [would] be safer with them than they would be in a locally incorporated bank." *Id.* (citing Heininger, *supra*, at 911-12). With the volatile situation in Vietnam in the early 1970's, this assurance of safety was undoubtedly one of the primary factors motivating Vietnamese depositors, like Trinh, to place their money in Citibank.[4] Certainly, these depositors expected that Citibank, with its worldwide assets and international reputation, would be "good" for the deposits if, for *whatever reason*—whether it be financial mismanagement, insolvency, or political events—Citibank Saigon could not return them. In our view, the deposit agreement did not dispel these expectations. That is, while we recognize that the deposit agreement absolved the *branch office* of responsibility for losses resulting from government orders and "any other cause beyond its control," we do not find in that agreement *any* indication that the depositor could not proceed against the home office if the branch has failed to pay.

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[4] That Trinh relied on this safety factor is evidenced by an English translation of the agreement he signed when the account was originally opened on July 25, 1974. The agreement contains a section where the depositor is asked to indicate, by checking the relevant box, his reason for opening an account with Citibank. Trinh's reason for banking at Citibank was: "My money is safer with Citibank." *See* J. App. at 130-31.

Consistent with this, we reject Citibank's argument that the provision of the agreement limiting payment on deposits to Vietnam and to Vietnamese piasters was sufficient to inform depositors that they were to bear the risk of loss, and would have no recourse against the home office, if Citibank Saigon was forced to close due to revolutionary conditions. As we have emphasized, such an allocation of risk is contrary to the depositor's expectations that the bank, by operating through a branch, has consented to be liable elsewhere for the branch's obligation in the event the branch does not meet them. Banks certainly can, and will, seek to limit by contract the extent of their exposure to such liability; however, to be effective, such limitation provisions must be explicit and must clearly and unmistakably inform depositors that they have no right to proceed against the home office. The provision here, specifying the place where the branch will make payment and the currency it will use, is insufficient under this standard. In our view, a person who had signed a deposit agreement containing such a provision would not have been aware that he had given up his right to proceed against the home office in the event the branch was no longer in existence and could not pay its depositors.

We do not believe that the Vietnamese law of *force majeure*, applied to the deposit agreement, requires us to reach a contrary conclusion. *Force majeure* is a French term used to describe acts of God, acts of government, and any other fortuitous cause beyond the control of the parties in the contract. The doctrine was codified in section 1206 of the Vietnamese Commercial Code, which provided that the "depositary is not liable for accidents or risks resulting from *force majeure*, unless previously he has been given notice to return the deposited object." *See supra* note 3. Citibank's expert on Vietnamese law, Mr. Ta Van Tai, testified that in his opinion the takeover of the bank and the abolition of the piaster by the Viet-

cong was an act of government beyond the control of the bank. In his view, since Trinh did not previously request return of his deposits, Trinh must suffer the loss.

While we do not deny that the closing of a bank by revolutionary forces is the type of fortuitous cause contemplated by the law of *force majeure*, we do not agree that, where a parent branch relationship is involved, application of that doctrine requires the conclusion that the depositor is to bear the risk of loss. As recognized by both the lower court here and the Second Circuit in *Vishipco*, impossibility of performance in Vietnam did not relieve Citibank of its obligation to perform elsewhere. *Vishipco*, 660 F.2d at 863-64. Citibank had accepted the risk of such an obligation by operating a branch in Vietnam. Since its Vietnamese depositors did not waive their right to proceed against the home office, Citibank cannot be heard to argue that the inability of its Saigon branch to perform relieves the home office of liability for the bank's debts incurred in Saigon. In our view, Citibank, as an ongoing business entity, was able in April 1975, and remains able to this day, to discharge those debts either in New York or at a variety of other points outside of Vietnam.

For the above reasons, we are in agreement with the lower court that the deposit agreement construed under Vietnamese law does not foreclose Trinh from proceeding against Citibank's New York office to recover on the deposits made at Citibank's branch in Saigon. Accordingly, unless it is relieved of liability by some affirmative defense, Citibank is liable to Trinh for the amount deposited.

B.

Citibank argues, as a defense to liability, that the National Bank of Vietnam expressly assumed Citibank Saigon's assets *and* liabilities, thereby becoming liable on Trinh's account as Citibank Saigon's successor in interest.

Citibank argues that this assumption of Citibank Saigon's obligations was undertaken as early as April 25, 1975, when the National Bank of Vietnam, still operating under South Vietnamese rule, guaranteed to return all money legally deposited in the recently-evacuated U.S. branch banks. Citibank further argues that when the Vietcong overran Saigon less than a week later, the new government confirmed, rather than denied, this assumption of assets and liabilities. As evidence of this, Citibank points to a number of published declarations of the new government, including, most specifically, its declaration that "[a]ll . . . banks . . . will be confiscated and, from now on, managed by the revolutionary administration," J. App. at 148, and its declaration that the newly-reorganized National Bank of Vietnam was "ready to recover former debts incurred by banks through lending and to conduct settlement of debts, deposits, savings and all other sources of capital in the economy." *Id.* at 152. According to Citibank, the confiscation of the banks and the assumption of assets and liabilities were the acts of a sovereign state which, under the act of state doctrine, must be given their intended effect by United States courts.

We agree with the district court that this defense does not relieve Citibank of its obligation on the deposits. As an initial matter, we believe Judge Gilmore was correct in holding that the April 25, 1975 announcement of the South Vietnamese government was not binding on the new regime and was irrelevant to the issue of whether the liabilities of Citibank Saigon had been assumed by the National Bank of Vietnam. In so holding, we are not unmindful that, under basic principles of state succession, a promise of a former state is generally binding on the successor state. *See, e.g., Vilas v. City of Manila*, 220 U.S. 345, 357 (1911) (quoting *Chicago Rock Island & Pacific Ry. Co. v. McGlinn*, 114 U.S. 542, 546 (1885)). However, in these circumstances, where revolutionary forces were closing in on Saigon and the South Vietnamese

government was squarely faced with its own imminent demise—a demise which became a reality only days later —we do not believe that a statement by the South Vietnamese government purporting to accept responsibility for the obligations of the evacuated U.S. branch banks is effective to bind the new regime with regard to those obligations.

Further, and more directly to the point, we are not at all persuaded that, by confiscating the nation's banks, the new government undertook to assume the *liabilities* of foreign banks, like Citibank Saigon, that fled the country in the face of the fall of South Vietnam. As the district court accurately observed, and as evidenced by various statements of the new regime quoted in the court's opinion (623 F. Supp. at 1535), Citibank's proof with regard to the assumption of liabilities of foreign banks was "equivocal at best." For example, in June of 1975, the National Bank issued a communique stating, among other things, that "*all* foreign banks must accept responsibility" for the liquidation of deposits. J. App. at 152. And, a September 7, 1975 newspaper announcement provided as follows:

> As regards banks whose owners have fled the country, the national bank will inventory and re-evaluate *their* assets and settle *their* accounts in order to determine *their ability* to return the savings of account holders; the bank will issue a notice concerning these persons.

Id. at 157 (emphasis added). These announcements, and others of similar tone, do *not* as the district court held, "indicate an unqualified assumption of all liabilities" by the new government. Indeed, in our view, the announcements suggest that the new government specifically did *not* intend to assume the liabilities of foreign banks whose "owners fled the country," but instead expected such liability to remain with those banks.

More importantly, the confiscation decree and other decrees of the new government regarding bank deposits would not, in any event, have had any effect on Citibank's debt to Trinh because, as recognized in *Vishipco* and in the court below, the deposits in Citibank Saigon no longer had their "situs" in Vietnam at the time of the decrees.

Generally speaking, an act of state will go unquestioned in United States courts only to the extent that it affects property whose "situs" is within the territorial jurisdiction of the acting state. While this is a relatively simple concept to apply with respect to tangible property, it becomes more difficult with respect to intangible property such as the debts of a bank. As one court has observed: "The situs of intangible property is about as intangible a concept as is known to the law." *Tabacalera Severiano Jorge v. Standard Cigar Co.*, 392 F.2d 706, 714 (5th Cir.), *cert. denied*, 393 U.S. 924 (1968). We think the court in *Vishipco* had it right in concluding that, for purposes of the act of state doctrine, a debt does *not* have its "situs" in the foreign state unless the state has the power to enforce or collect it; a power which, the court explained, is dependent upon jurisdiction over the *debtor*, *Vishipco*, 660 F.2d at 862 (citing *Harris v. Balk*, 198 U.S. 215 (1905)). Since in this case, as in *Vishipco*, the debtor (Citibank) abandoned its Saigon branch at the time of the Vietnamese decrees and no longer had any presence in Vietnam which would remain in existence after its departure, the revolutionary government had no jurisdiction over the debtor. Accordingly, the "situs" of the debts was not in Vietnam and the Vietnamese decrees could have no effect on Citibank's debt to Trinh. *See also* Heininger, *Liability of U.S. Banks*, 11 Law & Pol. Int'l Bus. at 975.[5]

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[5] As Professor Heininger observed:

> The situs of a bank's debt on a deposit is considered to be at the branch where the deposit is carried, but if the branch is closed . . . the depositor has a claim against the home office; thus,

For the above-stated reasons, Citibank's defense to liability fails and, accordingly, it is liable to Trinh on the deposit account.

C.

As a final observation, we believe that the result reached by this opinion is fair and equitable under the circumstances. We are, of course, not unmindful of the fact that both Trinh and Citibank are innocent parties and, to a great extent, victims of circumstances beyond their control. However, as with many disputes involving innocent parties, it is our job as a court to determine which of those parties is to suffer the loss. Here, because we are not persuaded that either the deposit agreement or the Vietnamese law of *force majeure* requires a contrary conclusion, we conclude that the loss is to be borne by the bank.

To this end, we think Judge Mansfield was absolutely right in *Vishipco*, where he observed:

> A bank which accepts deposits at a foreign branch becomes a debtor, not a bailee, with respect to its depositors. In the event that unsettled local conditions require it to cease operations, it should inform its depositors of the date when its branch will close and give them the opportunity to withdraw their deposits or, if conditions prevent such steps, enable them to obtain payment at an alternative location. In the rare event that such measures are either impossible or only partially successful, fairness dic-

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the situs of the debt represented by the deposit would spring back and cling to the home office. If the situs of the debt ceased to be within the territorial jurisdiction of [the confiscating state] from the time the branch was closed, then at the time the confiscatory decree was promulgated, [the confiscating state would] no longer [have] sufficient jurisdiction over it to affect it. . . . [U]nder the act of state doctrine, the courts of the United States are not bound to give effect to foreign acts of state as to property outside the acting state's territorial jurisdiction.

> tates that the parent bank be liable for those deposits which it was unable to return abroad. To hold otherwise would be to undermine the seriousness of its obligations to its depositors and under some circumstances (not necessarily present here) to gain a windfall.

Vishipco, 660 F.2d at 864 (citations omitted).

III.

For all of the foregoing reasons, Citibank is liable to Trinh on the deposits made by his father in the Saigon branch of Citibank.

JUDGMENT AFFIRMED.

BAILEY BROWN, Senior Circuit Judge, dissenting.

The majority opinion, as does the opinion of the district court, demonstrates a great deal of heart but will not stand careful legal analysis. For this reason, I respectfully dissent.

As was recognized by the district court, although Trinh, the plaintiff, alleged only diversity jurisdiction (28 U.S.C. § 1332), the court also had federal question jurisdiction because Citibank is a national bank (12 U.S.C. § 632). The district court then, in making its choice of law determination, wrestled with the question whether Michigan or federal common law conflict of laws should be applied and came to the conclusion that, irrespective of which it applied, Vietnam law governed. *Trinh v. Citibank, N.A.*, 623 F. Supp. 1526, 1531 (E.D. Mich. 1985). The parties, on appeal, agree with this determination.

Citibank advanced several theories of defense. The first was that, under the very terms of the contract between the depositor and Citibank at the time the deposits were made, and particularly in the light of the commercial law of Vietnam as to the effect of *force majeure*, Citibank was not liable to Trinh. The second defense was that the failure of Citibank to pay resulted from sovereign risk or *force majeure* rather than credit risk and that, under Vietnam law, sovereign risk was assigned to the depositor. Another defense was that the National Bank of Vietnam claimed the assets and assumed the liabilities of Citibank after Citibank's employees fled the country and before the communists took over. Still another defense was that Citibank was not liable to Trinh because the revolutionary communist government expropriated Citibank's Saigon branch, including the assets. Without intending to deprecate Citibank's other defenses, I believe that its first defense, based upon the terms of

the deposit contract, is a valid one and requires a reversal of the district court's judgment in favor of Trinh.[1]

The pertinent facts are undisputed. Citibank (formerly First National City Bank) is an international banking corporation based in New York which for many years prior to May 1975 operated a branch bank in Saigon, South Vietnam. In order to operate that branch, Citibank had to abide by Vietnamese banking laws, which, *inter alia*, required Citibank to establish a branch rather than a distinct corporate subsidiary, to maintain all the branch's assets in the local currency (piasters), and to keep all the branch's capital, assets, funds, books, and records separate and apart from those of the American home office.

In 1974, Trinh's father, a senator in the South Vietnamese government, opened a joint savings account at Citibank's Saigon branch in his name and that of his son.[2] The account paid an interest rate of 19 percent, compounded daily. The deposit agreement governing the account expressly provided, as required by Vietnamese banking law, that the account was payable solely at the Saigon branch office[3] and solely in piasters. The deposit

[1] Although the district court's opinion states (623 F.Supp. at 1532) that "Citibank, in the present case, has never argued that, under the law of Vietnam, Trinh's deposits do not equal a debt of the bank or form an underlying basis of recovery," it is clear that Citibank did indeed take this position. "Statement of Defendant's Claims and Defenses" in Final Pre-Trial Order, App. at 9. Moreover, the majority opinion properly recognizes that Citibank made this defense and addresses it.

[2] At the time, Trinh was a student residing in Michigan. He never returned to Vietnam and became a United States citizen in 1979.

[3] The deposit agreement provided that "[w]ithdrawals from an account will be permitted only at Citibank's *place of business*." (emphasis added). The deposit agreement specifically designated Citibank's "place of business" as "28-30 Nguyen Van Thinh, Saigon 1, Republic of Vietnam."

agreement also provided explicitly that Citibank's Saigon branch "does not accept responsibility for any loss or damage suffered or incurred by any depositor resulting from government orders, laws, levies, taxes, embargoes, moratoriums, exchange restrictions or from any other cause beyond its control."

In early April 1975, as North Vietnam's military forces approached Saigon, American embassy officials met with the branch bank's officers to consider the future safety of the branch bank's employees, both Vietnamese and American. The meetings produced a contingency plan for an emergency evacuation. During this time, the branch bank encouraged concerned depositors to withdraw their money, but the situation precluded, as the majority opinion recognizes, posting formal notices suggesting such withdrawals.

On April 24, 1975, on the eve of North Vietnam's takeover of Saigon, Citibank closed its Saigon branch and evacuated the branch's personnel in conjunction with the general evacuation coordinated by the American embassy. All of the branch's documents, files, records, and books were left in the building. The branch's keys, vault combination, and official documents list were entrusted to the Embassy's economics attache with a request that he turn them over to the National Bank of Vietnam, South Vietnam's central banking authority. There is no contention that Citibank removed any assets of its Saigon branch.[4]

The next day, on April 25, 1975, the South Vietnamese Finance Ministry and the National Bank of Vietnam issued a joint communique announcing:

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[4] The Citibank branch manager's testimony describing the confusion and fear leading to the escape from South Vietnam of the branch's personnel, including its Vietnamese employees, is a harrowing story. It was necessary for the manager to portray the Vietnamese employees as his personal dependents in order to get them out of the country. These employees surmised that bankers would not be favorably treated by the incoming revolutionary government.

> [T]he Chase Manhattan Bank, the First National City Bank [Citibank] and the Bank of America [have] closed temporarily without asking for permission from our government. . . . The National Bank would like to remind those who have accounts in these banks that the National Bank guarantees to return all the money legally deposited. Reimbursement procedures will be made public in a future communique of the National Bank.

No such "future communique" was ever issued, because several days later North Vietnam's forces overran Saigon and established a new, communist government. On May 1, 1975, the new government declared that "[a]ll . . . banks . . . will be confiscated and, from now on, managed by the revolutionary administration." Eight days thereafter, on May 9, 1975, the new government announced that "[t]he activities of all banks are temporarily suspended until further notice. All banks must be placed under the management of the Saigon-Gia Dinh Military Management Committee banking committee." The National Bank of Vietnam then reopened under communist rule and stated its readiness "to recover former debts incurred by banks through lending and to conduct settlement of debts, deposits, savings and all other sources of capital in the economy." Towards that end, over the next several months the National Bank of Vietnam published, *inter alia*, the following policies:

> With regard to previous deposits, securities and savings, all debtor banks, including all foreign banks, must accept responsibility for their liquidation and the submission of their records to the Vietnam National Bank. After settlement with banks, the Vietnam National Bank will conduct reviews and make known authorization to use deposits in accordance with production and commercial requirements and will pay out savings to workers and people according to new banking regulations.

> [T]he national bank guarantees that the savings accounts of workers, who legitimately earn their income through their own efforts and labor, will gradually be paid to them.
>
> As regards persons wanting to withdraw money on deposit at a bank . . . while awaiting the settlement of accounts with the private banks, the National Bank of Vietnam will study and satisfactorily meet loan requests for reasonable business and production needs.
>
> As regards banks whose owners have fled the country, the national bank will inventory and re-evaluate their assets and settle their accounts in order to determine their ability to return the savings of account holders[.]
>
> As for the comprador bourgeoisie who undertook speculation in wartime by relying on the U.S. Imperialists and colluding with the ringleaders in the puppet armed forces and administration and who fled abroad or still remain in the country, their entire property under state management will be confiscated completely or partly according to the gravity of their crimes.

Shortly after the communist takeover of Saigon, Trinh's father was placed in a "re-education" camp. Five years later, in early 1980, Trinh's father was released, whereupon he notified Trinh of the joint savings account in Citibank's former Saigon branch. Trinh then sought payment on that account at Citibank's office in New York. Citibank refused to pay on the ground that, in its view, the National Bank of Vietnam is now responsible for the account. In response, Trinh brought this suit.

During the bench trial, Trinh's evidence consisted primarily of his own testimony and that of a foreign currency expert. Trinh presented no expert testimony con-

cerning Vietnamese law. Citibank's evidence included the testimony of the customer service representative who opened Trinh's account, the manager who helped evacuate Citibank personnel, a foreign currency expert, and an expert on Vietnamese law.

Applying Vietnamese law, the district court held in favor of Trinh. *Trinh v. Citibank, N.A.*, 623 F. Supp. 1526 (E.D. Mich. 1985). In so doing, the district court relied heavily on *Vishipco Line v. Chase Manhattan Bank, N.A.*, 660 F.2d 854 (2d Cir.1981), *cert. denied*, 459 U.S. 976, 103 S.Ct. 313, 74 L.Ed.2d 291 (1982), a factually analogous case wherein the Second Circuit held Chase Manhattan's home office in New York liable to depositors at its former Saigon branch. Tracking the *Vishipco* court's line of reasoning, the district court first maintained (incorrectly, as heretofore stated in note 1) that Citibank never contended that under Vietnamese law the deposit agreement does not form a basis for recovery; the district court then went on to reject Citibank's three affirmative defenses: *force majeure* as set out in Vietnam's commercial law, assumption of Citibank's liabilities by the National Bank of Vietnam, and confiscation of Trinh's deposit by the communist government. Accordingly, the district court ordered Citibank to pay Trinh the dollar value of his account, with 19% interest.

I believe the district court misperceived Citibank's position and as a result failed to recognize a critical distinction between this case and *Vishipco*. In *Vishipco*, "neither party invoked foreign law with respect to Chase's basic obligations to its depositors and holders of certificates of deposit. Nor did Chase ever suggest that under Vietnamese law those obligations would not have formed a basis for recovery." 660 F.2d at 860. Therefore, the *Vishipco* court cursorily construed the deposit contract under *New York law* and held that the contract rendered Chase liable to its Saigon branch depositors unless Chase could prove an affirmative defense making

the contract unenforceable. Here, on the other hand, Citibank does indeed invoke Vietnamese law regarding its basic contractual obligations to its Saigon branch depositors and vigorously maintains that under Vietnamese law the deposit agreement between it and Trinh does not provide a basis for recovery, quite apart from the validity of its affirmative defenses. In other words, here Citibank argues that, as a threshold matter, the deposit agreement itself precludes recovery, whereas in *Vishipco* Chase apparently conceded that the deposit agreement created liability in the absence of some valid affirmative defense. Consequently, *Vishipco* is inapposite concerning the initial question of the scope of Citibank's contractual obligations to Trinh under Vietnamese law.[5] It is to that question, which is one of first impression, that attention must now be directed.

Citibank concedes that under the deposit agreement its domestic home office must rectify the Saigon branch's failure to pay on Trinh's account if such failure results from financial mismanagement, insolvency, robbery, natural catastrophe, or virtually any other circumstance in which the rectification could still entail payment in Vietnam in piasters. Citibank maintains, however, that under the deposit agreement its domestic home office need not rectify the Saigon branch's failure to pay on Trinh's account if such failure results from political events mak-

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[5] The parties agree, as heretofore stated, that, because Citibank's branch was located in Vietnam and because the account was opened and made payable in Vietnam and in Vietnamese currency, Vietnamese law governs the deposit agreements between Citibank's former Saigon branch and Trinh. *See, e.g., Zimmermann v. Sutherland*, 274 U.S. 253, 47 S.Ct. 625, 71 L.Ed. 1034 (1927); *Dougherty v. National City Bank*, 157 Misc. 849, 285 N.Y.S. 491 (1935); Restatement (Second) of Conflict of Laws § 188 (1971); Uniform Commercial Code § 4-102(2) (1977); Logan and Kantor, *Deposits at Expropriated Foreign Branches of U.S. Banks*, 1982 U. of Ill. L. Rev. 333, 341; Heininger, *Liability of U.S. Banks For Deposits Placed in Their Foreign Branches*, 11 Law & Pol'y Int'l Bus. 903, 944-50 (1969).

ing payment in Vietnam in piasters impossible. (The piaster ceased to exist shortly after the communist government was installed.) In other words, Citibank contends that the deposit agreement implicitly distinguishes between credit risk and sovereign risk, with Citibank bearing the former and Trinh bearing the latter. In Citibank's view, that crucial distinction arises from certain provisions of the deposit agreement construed in light of the Vietnamese and American legal framework in which Citibank's Saigon branch operated.

More precisely, Citibank points to the provisions of the deposit agreement limiting payment on the account to Vietnam and to Vietnamese currency and relieving Citibank's Saigon branch of liability "for any loss or damage suffered or incurred by any depositor resulting from government orders, laws . . . or from any other cause beyond its control." According to Citibank, those clear and simple provisions, construed together, evince the parties' intent to terminate Citibank's responsibility to pay on a deposit where, as here, a governmental revolution precludes payment in Vietnam in piasters.

Moreover, in Citibank's view, such an intent appears from not just the deposit agreement's plain language, but also the background of Vietnamese commercial law. That law incorporates the doctrine of *force majeure*,[6] which, according to uncontradicted expert testimony, requires that losses lie where they fall under the extraordinary circumstances present here. According to Citibank, in the absence of clear contractual language to the contrary, it should be assumed that the parties meant the deposit

[6] Article 701 of the Vietnamese Commercial Code (V.C.C.) provided: "The debtor does not have to pay damages if his violation or non-performance of contractual obligations is due to a fortuitous cause or a case of *force majeure*." Article 1206 of the V.C.C. provided: "The depository is not liable for accidents or risks resulting from *force majeure*, unless previously he has been given notice to return the deposited object."

agreement to be consistent with Vietnam's codification of *force majeure*.

Citibank also maintains that the parties' intent may be inferred in part from American regulations governing foreign branch banking. Citibank notes that the Federal Reserve Board, the federal agency with authority over international banking operations of United States banks, has long encouraged foreign branches to operate, to a significant extent, as separate entities from their domestic home offices, and has permitted foreign branches to offer unusually attractive interest rates in exchange for the depositors' acceptance of the risk of political upheaval. For example, during 1974 and 1975, deposits payable only at an office outside the United States were exempt from reserve requirements and from the then prevailing 5% cap on savings deposit interest rates. *See* 12 C.F.R. §§ 204.2(t), 217.0(c) and 217.7(c) (1974 and 1975). Thus, Trinh's account at Citibank's Saigon branch paid 19% interest, 14% more than a comparable domestic dollar account. Moreover, the Federal Reserve Board expressly warned banks that the reserve and interest exemptions would no longer apply to deposits in foreign branches if banks "entered into agreements . . . with depositors that in effect guarantee payment of such deposits in the United States if the foreign branch is precluded from making payment." 35 Fed. Reg. 2768 (1970), codified at 12 C.F.R. §§ 204.112(c) and 217.146 (1980).[7]

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[7] The Federal Reserve Board went on to say: "In the Board's judgment, the applicability of these exemptions from [reserve requirements and interest rate limitations] is limited to deposits in foreign branches as to which the depositor is entitled, under his agreement with the bank, to demand payment only outside the United States, *regardless of special circumstances*. Said exemptions are intended principally to enable foreign branches of U.S. banks to compete on a more nearly equal basis with other banks in foreign countries in accordance with the laws and regulations of those countries. *A customer who makes a deposit that is payable solely at a foreign branch assumes whatever risk may exist that the*

These regulations, Citibank contends, indicate that the parties meant to restrict payment on Trinh's account to Vietnam and Vietnamese currency under any and all circumstances in order to secure the legality of the 19% interest rate.[8]

In sum, Citibank argues that the deposit agreement itself and the legal framework in which the agreement was made reveal the parties' intent to place on the depositor, Trinh, the risk of loss occasioned by a political catastrophe, such as the violent overthrow of South Vietnam and subsequent confiscation and nationalization of Citibank's Saigon branch, that prevents Citibank from paying on the deposits in Vietnam in piasters.

In response, Trinh contends simply that pursuant to general banking principles under Vietnamese as well as American law, a domestic home office is always ultimately liable for the unpaid debts of its foreign branches, though he cites no Vietnam law to that effect. To support his contention, Trinh relies primarily on the famous *Sokoloff* cases,[9] wherein the New York courts held the National City Bank of New York liable to its Petrograd branch depositors even though the Russian Revolution resulted in

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foreign country might impose restrictions on withdrawals. When payment of a deposit in a foreign branch is guaranteed by a promise of payment at a banking office in the United States if not paid at the foreign office, the depositor no longer assumes such risk, but enjoys substantially the same rights as if the deposit had been made in a U.S. office of the bank. To assure the effectiveness of [reserve requirements and interest rate limitations] and to prevent evasions thereof, the Board considers that such guaranteed foreign-branch deposits must be subject to those regulations." 35 Fed. Reg. 2768 (emphasis added).

[8] The majority opinion does not deal with the effect of the Federal Reserve regulation.

[9] *Sokoloff v. National City Bank*, 239 N.Y. 158, 145 N.E. 917 (1924), and *Sokoloff v. National City Bank*, 130 Misc. 66, 224 N.Y.S. 102 (1927).

the confiscation and nationalization of the Petrograd branch. In so holding, the official referee [19] in *Sokoloff* stated:

> Where a bank maintains branches, each branch becomes a separate business entity, with separate books of account . . . Nevertheless, when considered with relation to the parent bank, they are not independent agencies; they are, what their name imports, merely branches and are subject to the supervision and control of the parent bank, and are instrumentalities whereby the parent bank carries on its business, and are established for its own particular purposes, and their business conduct and policies are controlled by the parent bank, and their property and assets belong to the parent bank, although nominally held in the names of the particular branches. *Ultimate liability for a debt of a branch would rest upon the parent bank.*

Sokoloff v. National City Bank, 130 Misc. 66, 73, 224 N.Y.S. 102, 114 (1927) (citations omitted) (emphasis added). Moreover, Trinh observes that the *Vishipco* court construed the *Sokoloff* cases to mean that, *as a matter of law*, "[b]y operating in Saigon through a branch rather than through a separate corporate entity, Chase accepted the risk that it would be liable elsewhere for obligations incurred by its branch . . . U.S. banks, by operating abroad through branches rather than through subsidiaries, reassure foreign depositors that their deposits will be safer with them than they would be in a locally incorporated bank." 660 F.2d at 863. Therefore, in Trinh's view, Citibank's home office in New York is legally bound to pay its Saigon branch depositors regard-

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[19] The *Vishipco* court incorrectly identified the referee as "Harrison Tweed, of the Milbank Tweed firm," 660 F.2d at 863. The referee was actually Alfred R. Page. Harrison Tweed was the referee in *Dougherty v. National City Bank*, 157 Misc. 849, 285 N.Y.S. 491 (1935), a case quite damaging to the result reached in *Vishipco*. *See* discussion, *infra*.

less of the nature of the circumstances rendering the Saigon branch unable to pay.

I agree with Citibank that Trinh must bear the loss of his savings deposit. I would so hold because I believe the deposit agreement so requires. In my view, the agreement's clear and specific provisions limiting payment on the deposit to Vietnam and to Vietnamese currency, and relieving the Saigon branch of liability for damage to a depositor caused by governmental actions or causes beyond the branch's control, create a legal relationship between Citibank's domestic home office and its Saigon branch requiring the domestic home office to rectify the Saigon branch's failure to pay on a deposit only if such rectification can occur in Vietnam and in piasters. In other words, the provision discharging the Saigon branch of liability serves to discharge the domestic home office of liability as well if the governmental action or other cause precludes payment in Vietnam in piasters. Here, the communist overthrow of South Vietnam and subsequent confiscation and nationalization of Citibank's Saigon branch surely falls within the deposit agreement's discharge-of-liability provision and prevents Citibank's domestic home office from paying Trinh in Vietnam in piasters. Consequently, the deposit agreement calls for Trinh to suffer the loss and, in turn, Trinh's action against Citibank must fail.

This interpretation of the deposit agreement is buttressed, as Citibank correctly points out, by the legal setting in which the Saigon branch operated. An expert on Vietnamese law testified without dispute that under Vietnamese law losses lie where they fall when extraordinary events such as those present here prevent a bank from honoring its obligation to pay on a deposit. If the parties had intended to bind themselves contractually to a different result by making Citibank's domestic home office a complete guarantor of its Saigon branch, they would have so provided explicitly. Furthermore, in order

to offer Trinh a 19% interest rate legally, Citibank's Saigon branch had to refrain from making any guarantee of payment on Trinh's deposit in the United States; and in order to offer Trinh a 19% interest rate wisely, Citibank's Saigon branch had to allocate to Trinh the risk of political upheaval.

In addition, the *Sokoloff* cases simply do not stand for the broad general proposition that an American bank's home office is always ultimately liable for the debts of its foreign branches. As perceptively and correctly construed by later New York cases, *see Dougherty v. Equitable Life Assurance Soc'y*, 266 N.Y. 71, 193 N.E. 897 (1934); *Dougherty v. National City Bank*, 157 Misc. 849, 285 N.Y.S. 491 (1935), the *Sokoloff* cases stand solely for the narrow principle that, *under New York law*, an American home office is liable for the debts of its foreign branches confiscated and nationalized by a revolutionary regime where the initial deposit is made *in the United States in dollars*. Thus, the *Sokoloff* cases have no application where, as here, Vietnamese law applies and the initial deposit was made in Vietnam in piasters.

Finally, Trinh is absolutely correct that "U.S. banks, by operating abroad through branches rather than through subsidiaries, reassure foreign depositors that their deposits will be safer with them than they would be in a locally incorporated bank." *Vishipco*, 660 F.2d at 863. But that assurance of greater safety applies, under the deposit agreement, only to credit risks, not political risks. As Citibank's *amicus* brief to the *Vishipco* court explained:

> U.S. banks with overseas branches do accept many risks on behalf of their customers, but these risks are economic and not political. For example, Citibank, a debtor when it accepts deposits, assures its depositors that as an institution with massive re-

> sources it will stand behind each deposit at each branch, to the extent it can legally do so. Even if the foreign branch burns down, is unprofitable, becomes insolvent, is robbed or defrauded, or physically disappears by reason of earthquake or other natural disaster, the bank as an institution will continue to operate. In this regard, Citibank and other large banks (domestic or foreign) do provide greater economic security than smaller, local banks.

Quoted in Logan and Kantor, *Deposits at Expropriated Foreign Branches of U.S. Banks*, 1982 U. of Ill. L. Rev. 333, 337 n. 9. In other words, Citibank's Saigon branch provided to its depositors greater protection than did local banks because Citibank's domestic home office undertook to stand behind its Saigon branch under virtually all circumstances, all circumstances *except* those in which the governmental actions prevented payment on deposits in Vietnam in piasters. Under the deposit agreement, the risk of those latter circumstances fell on the depositor.

For the foregoing reasons, I would vacate the judgment of the district court and remand for dismissal.

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

No. 86-1258

NGOC QUANG TRINH

v.

CITIBANK, N.A.

July 8, 1988

Judgment of Appeal from the
United States District Court
for the Eastern District of Louisiana

Before: KEITH and JONES, Circuit Judges, and BROWN, Senior Circuit Judge.

JUDGMENT

ON APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said district court in this case be and the same is hereby affirmed.

IT IS FURTHER ORDERED that Plaintiff-Appellee recover from Defendant-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said district court, if necessary.

ENTERED BY ORDER OF THE COURT
LEONARD GREEN
Clerk

/s/ Leonard Green
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

No. 86-1258

NGOC QUANG TRINH

versus

CITIBANK, N.A.

Order Denying Motion of Citibank for Rehearing and Suggestion for Hearing *En Banc* Entered on September 21, 1988

Before: KEITH and JONES, Circuit Judges, and BROWN, Senior Circuit Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

No. 86-1258

NGOC QUANG TRINH

versus

CITIBANK, N.A.

Amendment to Order Denying Motion of Citibank for Rehearing and Suggestion for Hearing *En Banc* Entered on September 22, 1988

Before: KEITH and JONES, Circuit Judges, and BROWN, Senior Circuit Judge

Upon consideration, it is ORDERED that the order filed on September 21, 1988 denying the petition for rehearing en banc in the above case be amended to add the following paragraph:

> "Judge Brown would grant the petition for rehearing en banc for the reasons stated in his dissent."

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

No. 84-CV-2794-DT

NGOC QUANG TRINH

versus

CITIBANK, N.A.

December 20, 1985

Lawrence C. John, Detroit, Mich., for plaintiff.

Mason, Steinhardt & Jacobs, John E. Jacobs, Southfield, Mich., Sherman & Sterling, Jennifer Freeman, New York, N.Y., for defendant.

GILMORE, District Judge.

I

This is an action on a debt by which plaintiff seeks the return of deposits made in 1971 by his father into a joint bank account in Citibank, Saigon, Vietnam.

On July 25, 1974, Quang Quy Trinh, plaintiff's father, opened a "Golden Pass Book Account" at Citibank, Saigon, a branch of defendant Citibank, N.A. The account was a joint account in his name and the name of his son, Tinh. The initial deposit was of two million piasters. On

October 25, 1974, Trinh's father made a deposit of one million piasters.

At the time Trinh's father opened this account, Trinh was a student in Michigan. He never returned to Vietnam. He became a United States citizen in 1979. Trinh testified that his father told him about the account and that he understood the account was for him and for his education.

On April 24, 1975, Citibank Saigon closed its operations, leaving its keys at the U.S. Embassy. American and Vietnamese employees of the bank fled the country. On April 30, 1975, the South Vietnamese government in Saigon fell. On May 1, 1975, the revolutionary forces anounced their victory and the creation of a Provisional Revolutionary Government.

Shortly after the fall of Saigon, plaintiff's father was placed in a re-education camp. After his release in 1980, he sent the Citibank Saigon passbook to his son in Michigan. In May 1980, Trinh called the International Division of Citibank in New York to inquire about the deposit. Trinh was told that the National Bank of Vietnam was now responsible for the deposit. On November 5, 1980, Trinh wrote to Walter Winston, Chairman of Citibank, expressing dissatisfaction with this reply, and K.S. Lee, of Citibank, replied on November 17, 1980 that the National Bank of Vietnam was responsible for the Golden Passbook deposit.

Citibank argues that the parent bank is not liable for deposits placed in its foreign branch since the branch is a separate entity. While this is generally true as long as the branch remains open, it ceases to be true if the branch closes or wrongfully refuses to return a deposit. The leading case of *Sokoloff v. National City Bank*, 239 N.Y. 158, 145 N.E. 917 (1924), established the principle that the home office of a bank is liable on a deposit placed in its foreign branch when the branch has wrongfully

failed to return the deposit. *See also* Heininger, *Liability of U.S. Banks for Deposits Placed in Their Foreign Branches*, 11 Law and Pol. Int'l Bus. 903, 926 (1979), and *Sokoloff v. National City Bank*, 130 Misc. 66, 224 N.Y.S. 102 (Sup.Ct. 1927), *aff'd* 250 N.Y. 69, 164 N.E. 745 (1928).

The principles of *Sokoloff* have recently been applied by the Second Circuit in a case very similar to the case at bar. In *Vishipco Line v. Chase Manhattan Bank, N.A.* 660 F.2d 854 (1981), one individual and several corporate plaintiffs sought the return from Chase Manhattan Bank in New York of deposits that had been made in Chase's Saigon branch prior to the fall of South Vietnam. Chase left Vietnam on the same date as Citibank under similar circumstances. The legal arguments presented, as well as the facts of the two cases, are similar.

The *Vishipco* Court found Chase liable on the deposits in question. This Court finds the reasoning in *Vishipco* persuasive. As in *Vishipco*, the bank in this case is in the relationship of debtor to its depositor. When Citibank Saigon closed its doors without warning, the parent bank became liable on the deposit. Nonetheless, Citibank argues that it is relieved of this liability by the Vietnamese law of *force majeure*, by the assumption of its liabilities by the National Bank of Vietnam, and by the confiscation of Trinh's account. Although these arguments failed in *Vishipco, supra*, Citibank argues that its situation is distinguishable and that, therefore, these defenses should succeed here. The Court rejects this argument for the reasons stated below.

II

Jurisdiction is founded both upon diversity and upon the existence of a federal question. Trinh is a citizen of Michigan, and Citibank is a national bank located in New York. National banks are treated as citizens of the state in which they are located. *See* 13B C. Wright and A.

Miller, *Federal Practice and Procedure* § 3571 (1984). The $10,000 amount in controversy requirement is met because plaintiff claims that as of November 5, 1980 (the date of plaintiff's demand letter), the original 3,000,000 piaster deposit was worth $12,333. Defendant's argument that the amount in controversy is not met because the piaster is valueless cannot prevail since plaintiff's claim is made in good faith and it does not appear to a legal certainty that the claim is really for less than $10,000. *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 58 S.Ct. 586, 82 L.Ed. 845 (1938).

In addition, the Court has federal question jurisdiction over this action under 12 U.S.C. § 632, which states in pertinent part:

> Notwithstanding any other provision of law, all suits of a civil nature at common law or in equity to which any corporation organized under the laws of the United States shall be a party, arising out of transactions involving international or foreign banking, or banking in a dependency or insular possession of the United States, or out of other international or foreign financial operations, either directly or through the agency, ownership, or control of branches or local institutions in dependencies or insular possessions of the United States or in foreign countries, shall be deemed to arise under the laws of the United States, and the district courts of the United States shall have original jurisdiction of all such suits; and any defendant in any such suit may, at any time before the trial thereof, remove such suits from a State court into the district court of the United States for the proper district by following the procedure for the removal of causes otherwise provided by law.

Defendant is a corporation organized under the laws of the United States, and this case arises out of a transaction involving foreign banking, or banking in a branch in a foreign country.

III

Defendant has attempted to distinguish the case at bar from *Vishipco, supra*, based in part on choice of law principles. Therefore, analysis of defendant's position must begin with a discussion of the choice of law rules that apply.

Plaintiff and defendant both correctly argue that federal courts sitting in diversity apply the choice of law rules of the forum state. *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). However, defendant further argues that, because there is federal question jurisdiction here, and because in federal question cases federal common law choice of law rules apply, *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 629 F.2d 786 (2d Cir. 1980), *cert. denied* 449 U.S. 1080, 101 S.Ct. 863, 66 L.Ed.2d 804 (1981), this Court must apply federal common law choice of law rules.

It is not clear that, when a federal court has both diversity and federal question jurisdiction, federal common law choice of law rules must be applied. In *Corporacion Venezolana de Fomento v. Vintero Sales Corp., supra*, the court had only federal question jurisdiction under 12 U.S.C. § 632. The court held it did not have diversity jurisdiction because of the presence of aliens as parties on both sides of the case. The court did not say what result would obtain if it had *both* federal question and diversity jurisdiction. The court did say that "[w]ere this a diversity case, *Klaxon* (citation omitted) would require that we look to the choice of law doctrines of the forum state." *Id.* at 795. However, since it had only federal question jurisdiction, it looked to federal common law choice of law doctrine.

In *Citibank, N.A. v. Benkoczy*, 561 F. Supp. 184 (S.D. Fla. 1983), Citibank sued Florida residents on a guarantee of obligations of a Haitian corporation. The court did

not state whether it had diversity jurisdiction. The court held that it had jurisdiction under 12 U.S.C. 632, and applied federal common law choice of law rules. The court noted that, "[w]ere this a diversity case, the decision as to what substantive law to apply would be controlled by the conflicts of law rules of the forum state, Florida." The court did not explicitly state whether it applied federal choice of law rules *because* it had no diversity jurisdiction or in spite of having diversity jurisdiction.

Research has not disclosed any case exactly on point. However, *Stud v. Trans International Airlines*, 727 F.2d 880 (9th Cir. 1984) suggests that, where diversity jurisdiction exists in addition to federal question jurisdiction, the forum state's choice of law rules can be used. The *Stud* court said:

> Because our jurisdiction is based not simply on the existence of a federal question under the version of the Warsaw Convention in force in the United States, (citation omitted), but on diversity of citizenship as well, we are not compelled to apply the United States version of the Convention. Instead, we use the choice of law rules of California, the state in which this action was filed, to determine the applicable law.

Id. at 881.

And *Cutler v. Bank of America National Trust & Savings Association*, 441 F. Supp. 863, 865 (N.D. Cal. 1977), in a case in which jurisdiction was based on 12 U.S.C. § 632, applied the choice of law rules of the forum because "[I]t is established law that the source of the right, rather than the basis of federal jurisdiction invoked, controls determination of the applicable law . . ." *Id.* at 865.

Of course, the question of whether to apply Michigan's choice of law rules or federal common law choice of law

rules only matters if they would lead to a different result in this case. Plaintiff argues that Michigan's choice of law rules would require this Court to apply Michigan law to his claim. Defendant argues that both Michigan and federal common law choice of law rules require this Court to apply the law of Vietnam.

As to the federal common law choice of law rules, defendant cites *Aaron Ferer & Sons Ltd. v. Chase Manhattan Bank*, 731 F.2d 112 (2d Cir. 1984). In that case, which arose under 12 U.S.C. § 632, the court applied the federal choice of law rules as follows: As to the issue of restitution, the court analyzed the relationship of the occurences and parties to New York in accordance with the Restatement (Second) Conflict of Laws § 221 (1971) and concluded that New York law governed because the banking relationship between the parties arose there, the banking transactions occurred there, Chase's principal office was located there, the plaintiff had an office there, and Chase received plaintiff's money there.

Here, Citibank notes only the first relationship, i.e. that the banking relationship was in New York. However, the Restatement (Second) Conflict of Laws § 188 and § 221 (1971) suggest that a whole range of contacts be examined, as indeed the *Aaron Ferer* court did. In the case at bar, the relationship does not point as unequivocally to Vietnam as it pointed to New York in *Aaron Ferer*. The banking relationship did begin in Vietnam, the transactions took place in Vietnam, and defendant Citibank did receive plaintiff's money in Vietnam. However, Citibank's principal office is in New York, and it is no longer located in Vietnam at all. Plaintiff resides in Michigan, and the "thing" involved here—the debt—is no longer located in Vietnam (under the rule of *Vishipco, supra*). Although this case has contacts with both New York and Vietnam, the more significant contacts are with Vietnam.

Defendant argues, and plaintiff admits, that the general Michigan choice of law rule is that a contract is

governed by the law of the place where it is made. *Wells v. 10-X Manufacturing Co.*, 609 F.2d 248 (6th Cir. 1979). There, the general rule would point this Court to the law of Vietnam. Plaintiff's cases cited for exceptions to this rule do not obtain here. Plaintiff cites *Mills v. Anderson*, 238 Mich. 643 (1927) for the principle that where a creditor is domiciled in Michigan, Michigan courts apply Michigan law. However, in that case, the court found the situs of the debt in issue to be with the *debtor* in Michigan. Plaintiff's other cases deal with the question of the situs of a debt, but not with the question of choice of law.

Michigan's adoption of the Uniform Commercial Code provides the explicit statutory choice of law rule. M.C.L.A. § 440.4102 states:

> (2) The liability of a bank for action or non-action with respect to any item handled by it for purposes of presentment, payment or collection is governed by the law of the place where the bank is located. In the case of action or non-action by or at a branch or separate office of a bank, its liability is governed by the law of the place where the branch or separate office is located.

Plaintiff ignores this provision. Defendant cites it without analyzing it. There are no Michigan cases annotated under it. Heininger, *Liability of U.S. Banks For Deposits Placed in Their Foreign Branches*, *supra*, discusses this U.C.C. provision as "pointing" to choosing the law of the place where the branch is located.

Plaintiff's claim that the law of Michigan applies must clearly be rejected. Michigan and federal choice of law rules require application of either the law of Vietnam or the law of New York. Under the federal choice of law analysis, Vietnam has the most significant contacts with the action. Michigan common law and M.C.L.A. 440.4102 (2) indicate that the law of Vietnam should be applied in this case.

IV

The choice of law determination that the law of Vietnam applies does not distinguish this case from *Vishipco, supra.* In *Vishipco* the court applied the law of New York to the "underlying obligation," and the law of Vietnam to Chase Manhattan's defenses. There, defendant Chase Manhattan Bank argued that, since New York's choice of law rules called for the case to be governed by the law of Vietnam, and since the plaintiffs had failed to prove they were entitled to recover under Vietnamese law, plaintiff's claims were dismissible under Fed.R. Civ.P. § 44.1. The Second Circuit rejected that argument, holding:

> While, as the Advisory Committee's notes to Rule 44.1 make clear, a court is still permitted to apply foreign law even if not requested by a party, we believe that the law of the forum may be applied here, where the parties did not at trial take the position that plaintiffs were required to prove their claims under Vietnamese law, even though the forum's choice of law rules would have called for the application of foreign law. This reflects the view adopted by ourselves and other federal courts since 1966.

Id. at 860.

The Court went on to say:

> While Chase invoked foreign law under Rule 44.1 with respect to its own affirmative defenses only, neither party invoked foreign law with respect to Chase's basic obligations to its depositors and holders of certificates of deposit. Nor did Chase ever suggest that under Vietnamese law those obligations would not have formed a basis for recovery.

Id. at 860.

The court then held that it would apply New York law to Chase's underlying obligation, and that under New

York law, unless relieved by a defense, Chase was obligated to pay plaintiffs the sums deposited with it.

In the present case, Citibank argues that, unlike Chase in *Vishipco*, it has, throughout pre-trial and at trial, taken the position that Trinh must prove his claim under Vietnamese law. Citibank further argues that Trinh cannot do so because the Vietnamese law of *force majeure* applies to Trinh's claim and relieves Citibank of liability on the deposit. The Court does not agree.

The instant case is not procedurally or factually distinguishable from *Vishipco* on this point. In the same sense that the *Vishipco* court says Chase never invoked foreign law as to its underlying obligation on the deposits, Citibank, in the present case, has never argued that, under the law of Vietnam, Trinh's deposits do not equal a debt of the bank or from an underlying basis for recovery.

Furthermore, the *Vishipco* court did address the argument that *force majeure* relieved Chase of liability. The court addressed this argument as an affirmative defense to which it applied the law of Vietnam. This is essentially no different from what Citibank asks this Court to do. The *Vishipco* court rejected Chase's arguments, which are directly analogous to the arguments Citibank makes here, as follows:

> Chase next argues that under Vietnamese law its failure to repay plaintiffs' deposits in the period prior to May 1, 1975, was not a breach of its deposit contract, because the conditions prevailing in Saigon at the time rendered payment impossible. In support of this argument, *Chase cites various sections of the South Vietnamese Civil Code which excuse performance under various extenuating circumstances*, as well as the provisions included in the deposit contracts used by the Saigon branch which purported to discharge the bank's responsibility for losses to de-

positors resulting from a variety of unexpected and uncontrollable sources.

This argument must be rejected for the reasons that impossibility of performance in Vietnam did not relieve Chase of its obligation to perform elsewhere. By operating in Saigon through a branch rather than through a separate corporate entity, Chase accepted the risk that it would be liable elsewhere for obligations incurred by its branch.

* * * *

U.S. banks, by operating abroad through branches rather than through subsidiaries, reassure foreign depositors that their deposits will be safer with them than they would be in a locally incorporated bank. *Heininger, supra*, at 911-12. Indeed, the national policy in South Vietnam, where foreign banks were permitted to operate only through branches, was to enable those depositing in foreign branches to gain more protection than they would have received had their money been deposited in locally incorporated subsidiaries of foreign banks. Chase's defenses of impossibility and *force majeure* might have succeeded if the Saigon branch had been locally incorporated or (more problematically) if the deposit contract had included an explicit waiver on the part of the depositor of any right to proceed against the home office. But absent such circumstances the Saigon branch's admitted inability to perform did not relieve the Chase of liability on its debts in Saigon, since the conditions in Saigon were no bar to performance in New York or at other points outside of Vietnam.

Id. at 863-64.

Thus, Citibank has failed to meaningfully distinguish itself from *Vishipco*.

Even if the Court accepts Citibank's proposition that the *force majeure* provisions of the Vietnamese Commercial Code apply to the underlying obligation of Citibank on the deposits it accepted, an analysis of those provisions applied to the facts of this case indicates that they do not relieve Citibank of liability.

The relevant provisions of Vietnamese law argued by Citibank are as follows:

> The depositary is not liable for accidents or risks resulting from *force majeure*, unless previously he has been given notice to return the deposited object.

Article 1206 of Vietnam Commercial Code.

> The debtor does not have to pay damages if his violation or non-performance of contractual obligations is due to a fortuitous cause or a case of *force majeure*.

Article 701 of the Vietnam Commercial Code.

Mr. Ta Van Tai, Citibank's expert witness on Vietnamese law, testified that *force majeure* is a French term to describe acts of God, acts of government, and any fortuitous cause beyond the control of the parties in the contract. Defendant offered Mr. Tai's opinion that this Vietnamese law applied to relieve Citibank of liability on its deposits when it closed its doors and left Vietnam on April 25, 1975.

This Court is not bound by Mr. Tai's opinion as to the application of Vietnamese law to this case. The Vietnamese *force majeure* law does not relieve Citibank of liability on its deposits in this case for the following reasons.

First, Citibank's closure and departure from Vietnam was clearly not due to an act of God. Neither was it due to an act of government. Citibank closed its doors on April 24, 1975, a week before the fall of South Vietnam.

In fact, it is clear from the April 25, 1975 joint communique of the South Vietnamese Finance Ministry and the National Bank that the government considered Citibank's action to be illegal. A news report of the communique, provided in defendant's exhibit 29, states that those two agencies announced "the Chase Manhattan Bank, the First National City Bank, and the Bank of America had closed temporarily without asking for permission from our government." The report went on to state, "The Finance Ministry and the National Bank will apply sanctions against these banks according to law." Clearly, the government of South Vietnam did not close the bank. And, of course, the revolutionary forces had not yet gained control and thus did not close Citibank. Citibank closed itself.

Citibank presented a great deal of evidence as to the chaotic situation in Saigon in April, and as to its humanitarian efforts to remove its Vietnamese employees from the country before the capitol fell. The gist of Citibank's argument is that this evidence shows that the closing of Citibank falls within the third definition of *force majeure*, i.e. that Citibank closed due to a fortuitious [sic] cause outside of its control. This fortitutious [sic] cause, Citibank argues, was the impending collapse of Saigon and the danger posed by the new regime to Citibank's Vietnamese employees.

However, Citibank's response to the political situation in Vietnam was a voluntary choice. Banks do not have to close in the face of impending revolutions, and they do not always do so. The decision to close was not beyond Citibank's control.

Citibank's position seems to be that, because the military and political situation of Vietnam was out of its control, its response to the situation (the decision to close) was also out of its control. If this were the meaning of *force majeure*, then, by analogy, *force majeure*

would apply to relieve a bank of liability when changes beyond its control in world financial markets made a branch unprofitable, and it therefore decided to close the branch and cut its losses. This cannot be the meaning of *force majeure*.

For the same reasons, Citibank's defense based on the *force majeure* clause in its deposit agreement must also fail even though it is enforceable under Vietnamese law.

Thus, Citibank has not meaningfully distinguished this case from *Vishipco*, *supra*, and the application of Vietnamese law does not relieve Citibank of its liability on Trinh's deposit.

V

Citibank's proofs regarding the assumption of its assets and liabilities by the National Bank of Vietnam do not distinguish this case from *Vishipco*, *supra*.

Citibank argues that it is relieved of liability on Trinh's deposit because the National Bank of Vietnam assumed its assets and liabilities and became its successor in interest. Since this argument was not made by Chase in *Vishipco*, Citibank argues it has distinguished itself from *Vishipco* sufficiently to call for a different result.

Chase did argue in *Vishipco* that the plaintiff corporation had been nationalized by the revolutionary administration and that, therefore, the government of Vietnam, rather than the exiled corporate directors, was the successor in interest of the corporations with standing to sue. The *Vishipco* court said that, in order to prove successorship in interest, the defendant had to prove that the government had stepped into the corporation's shoes and formally assumed both its assets and liabilities. In the case at bar, Citibank argues it has proved that the National Bank of Vietnam formally assumed both its assets and liabilities and became the successor in interest to Trinh's deposit.

Citibank's argument fails for two reasons. First, it is doubtful whether the National Bank of Vietnam could have assumed liability for Citibank's debt to Trinh since the *situs* of the debt was no longer in Vietnam at the time that Citibank claims the assumption took place. See discussion of confiscation, *infra*, at pp. 1535-36.

Second, even if the National Bank of Vietnam could have assumed Citibanks' liabilities, Citibank has not proved that it did so.

Citibank relies on three published announcements. The first of these, an April 25, 1975 joint communique of the National Bank and the Finance Ministry, is irrelevant since it is an announcement of the old regime before it fell to the Communists. Although the Revolutionary Administration allowed the National Bank of Vietnam to resume operation under the same name, Citibank's own proofs indicate that the bank was completely reorganized to conform to the revolutionary government's policies. There is no reason to believe that any statement or promise of the old regime was binding on the new.

Citibank further relies on newspaper announcements, dated September 7, 1975 and September 14, 1975, that the National Bank guaranteed it would gradually repay savings accounts to workers and laboring people. However, Citibank's proofs with regard to the National Bank's position on the deposits in foreign banks is equivocal at best. The June 17, 1975 communique contained in Citibank's Exhibit 33 states:

> With regard to previous deposits, securities and savings, all debtor banks, including *all foreign banks, must accept responsibility for their liquidation and the submission of their records to the Vietnam National Bank. After settlement with banks*, the Vietnam National Bank will conduct reviews and make known authorization to use deposits in accordance with production and commercial requirements and

> will pay out savings to workers and people according to new banking regulations. The Vietnam National Bank will not accept responsibility for improper or illegal activities by private banks.

The September 7, 1975 newspaper article relied on by Citibank also states:

> As regards persons wanting to withdraw money on deposit at a bank for use in agricultural, industrial or commercial development while *awaiting the settlement of accounts with the private banks*, the National Banks of Vietnam will study and satisfactorily meet loan requests for reasonable business and production needs.
>
> * * * *
>
> At present, the National Bank is allowing the various private banks to operate under the management of the national bank so that they can carry out their business operations *while settling their accounts*, such as collecting outstanding loans and returning savings accounts in accordance with regulations.
>
> *As regards banks whose owners have fled the country, the national bank will inventory and re-evaluate their assets and settle their accounts in order to determine their ability to return the savings of account holders; the bank will issue a notice concerning these persons.* (emphasis added)

Finally, the newspaper story of September 14, 1975 describes as a "very correct type of thinking" a willingness to write off as a loss treasury bond investments and "losses in bank money that went overseas and losses due to incorrect operation and to corruption in the private banks." These announcements do not indicate an unqualified assumption of all liabilities. In particular, there does not appear to be any clear assumption of the liabilities of banks that fled the country.

Finally, even the testimony of Citibank's witness Tai is that the National Bank had promised to repay savings accounts only to selected groups of people (workers). There is nothing to indicate that the National Bank assumed liability for the account of Trinh's father, a senator of the fallen regime. In fact, Citibank argues this account was confiscated.

The Court finds as a matter of fact that on this record Citibank has failed to prove that the National Bank of Vietnam assumed its liability on Trinh's deposit and became its successor in interest.

VI

Citibank's proofs as to confiscation of the account do not distinguish this case from *Vishipco, supra.*

Citibank also argues that it is distinguishable from *Vishipco* because it has succeeded in proving that the bank and the account at issue were confiscated whereas Chase in *Vishipco* failed to prove confiscation. This argument fails for two reasons. First, there is no significant difference between the circumstances of Chase's and Citibank's departures from Saigon. Chase gave its keys to the French Embassy; Citibank left its keys at the American Embassy with instructions to turn them over to the Vietnamese. The *Vishipco* court found that the French Embassy had turned over Chase's records to the revolutionary government. Citibank, in the case at bar, presented no evidence that the revolutionary government had in fact received its keys and records. There is no basis for Citibank's contention that these facts make its case stronger on the issue of confiscation than *Vishipco.*

More importantly, here, as in *Vishipco*, at the time of the confiscation decrees the deposit no longer had its *situs* in Vietnam. The reasoning in *Vishipco* is clear and persuasive. A debt is not located in a foreign state unless that state has the power to enforce or collect it, which

depends on jurisdiction over the debtor. Citibank no longer had any presence in Vietnam, and the revolutionary government had no jurisdiction over it. Hence, the confiscation decrees could have no effect on Citibank's debt to Trinh. *See Vishipco, supra* at 862. As that Court said, quoting a qualified commentator:

> The situs of a bank's debt on a deposit is considered to be at the branch where the deposit is carried, but if the branch is closed, . . . the depositor has a claim against the home office; thus, the situs of the debt represented by the deposit would spring back and cling to the home office. If the situs of the debt ceased to be within the territorial jurisdiction of [the confiscating state] from the time the branch was closed, then at the time the confiscatory decree was promulgated, [the confiscating state would] no longer [have] sufficient jurisdiction over it to affect it. . . . [U]nder the act of state doctrine, the courts of the United States are not bound to give effect to foreign acts of state as to property outside the acting state's territorial jurisdiction. Heininger, *Liability of U.S. Banks for Deposits Placed in Their Foreign Branches*, 11 Law & Pol. Int'l Bus. 903, 975 (1969) (footnotes omitted)

Id. at 862-63.

Citibank's defense that Trinh's account was confiscated must fail, just as the identical defense failed in *Vishipco*. Citibank has failed to distinguish itself from *Vishipco* in any important respect. This Court finds the reasoning in *Vishipco* persuasive, and, for all the reasons stated above, finds Citibank liable to Trinh on the deposit account.

VII

Both parties agree, and the law is settled, that a United States District Court can award judgment only in dollars. Thus, this Court faces the difficult task of

translating the account (which consisted of 3,000,000 piasters on October 25, 1974) into a judgment in dollars.

The difficulty of this task is compounded by the fact that the piaster no longer exists but was replaced by the South Vietnam dong on September 22, 1975. The South Vietnam dong was in turn replaced by the Vietnam dong on May 3, 1978. The difficulty of this task is further complicated by the fact that the piaster was a blocked currency (it could not be taken out of Vietnam) and it is currently illegal to trade in the Vietnam dong.

The first question is whether to convert the amount owed into dollars on the day of the breach (as argued by plaintiff) or on the day of the judgment (as argued by defendant). Whether to convert as of the breach day or the judgment day has presented a perplexing problem to federal courts, which have not always reached consistent results. *See* Becker, *The Currency of Judgment*, 25 Am.J.Comp.L. 2 152 (1977).

The Court finds that the answer to this question is governed by three Supreme Court opinions written by Justice Holmes. In *Hicks v. Guinness*, 269 U.S. 71, 46 S.Ct. 46, 70 L.Ed. 168 (1925), a German firm was indebted to an American firm on an account stated in marks on December 31, 1916 and payable to the American firm in the United States. The Court held that the American firm was entitled to recover the value in dollars that the mark had when the account *was stated*, saying:

> The loss for which the plaintiff is entitled to be indemnified is "the loss of what the contractor would have had if the contract had been performed," (citation omitted); it happens at the moment when the contract is broken, just as it does when a tort is committed, and the plaintiff's claim is for the amount of that loss valued in money at that time.

Id. at 80, 46 S.Ct. at 47.

However, one year later, in *Deutsche Bank Filiale Nurnberg v. Humphrey*, 272 U.S. 517, 47 S.Ct. 166, 71 L.Ed. 383 (1926), the Court found it erroneous to convert until the time of judgment. In that case, a U.S. depositor in a German bank had demanded his deposit on June 12, 1914. The debt was in marks. The Court said that, unlike the case in *Hicks*, on the date of demand the German bank owed no duty to the plaintiff *under U.S. law*. Thus, the obligation was fixed in marks on the date of demand and took the risk of later currency fluctuations.

In *Zimmerman v. Sutherland*, 274 U.S. 253, 47 S.Ct. 625, 71 L.Ed. 1034 (1927), Justice Holmes resolved the apparent contradiction between *Hicks* and *Deutsche Bank:*

> The decision of the Circuit Court of Appeals was right, and in view of the recent case of *Deutsche Bank Filiale Nurnburg v. Humphrey*, 272 U.S. 517 [47 S.Ct. 166], does not need extended reasoning. Here as there the debt was due and payable in the foreign Country. The only primary obligation was that created by the law of Austria-Hungary and if by reason of an attachment of property or otherwise the courts of the United States also gave a remedy the only thing that they could do with justice was to enforce the obligation as it stood, not to substitute something else that seemed to them about fair. *The distinction between the Deutsche Bank Case and Hicks v. Guinness, 269 U.S. 74 [46 S.Ct. 46], is not, as argued, that the plaintiff in Hicks v. Guinness was in the United States, but that, as the court understood the facts, the debt was payable in New York and subject to American law, so that upon a breach of the contract there arose a present liability in dollars.* (emphasis added.)

Id. at 255-56, 47 S.Ct. at 625-26.

Thus, where a debt in foreign currency is payable in a foreign country, the judgment day rule applies. This assumes a uniform result whether the suit is brought in the foreign country or in the United States. *See Shaw, Savill, Albion & Co., Ltd. v. The Fredericksburg*, 189 F.2d 952 (2d Cir. 1951).

However, where the obligation is payable in the United States, conversion is proper at the rate current at the time of breach. *See Bamberger v. Clark*, 390 F.2d 485 (D.C.Cir. 1968).

In the present case, the Court has held that the situs of Citibank's debt to Trinh sprang back to the home office when the Saigon branch was closed. Thus, Trinh has a claim against the home office. This is obviously payable in the United States. Also, there is no possibility of a suit in Vietnam to recover the deposit. Thus, under *Hicks, supra*, a present liability in dollars arose when Citibank wrongfully refused Trinh's demand on November 17, 1980. Therefore, the Court will apply the conversion rate in existence on November 17, 1980, the date of the breach.

Next, the Court must determine what rate of exchange to apply. Plaintiff urges the Court to convert the account into dollars at the effective rate of exchange in November 1980, which the evidence showed to be 2.39 Vietnam dongs to the dollar. Citibank urges the Court to convert the account into dollars at the unofficial market rate, which the evidence showed to be 17 Vietnam dongs to the dollar in November 1980.

The Court finds that the proper rate of conversion is the unofficial market rate of 17 dongs to the dollar. Courts have refused to look at official rates of exchange when currencies are blocked or when the official rate otherwise does not apply to the transaction at hand. *See Hughes Tool Co. v. United Artists Corp.*, 279 App.

Div. 417, 110 N.Y.S.2d 383 (1952), aff'd 304 N.Y. 942, 110 N.E.2d 884 (1953). *Cinelli v. CIR*, 502 F.2d 695 (6th Cir. 1974). Courts instead seek to apply commercial rates of exchange that reflect actual fair market value of foreign currency. Thus, the Court of Appeals for the Second Circuit directed the District Court in the *Vishipco* case (where, as here, there was no New York market rate of exchange since trading in Vietnamese currency is illegal in the U.S.) to determine the "true value" of the piaster and to evaluate the underground market for dollars in Saigon at the date of the breach. *Vishipco Line v. The Chase Manhattan Bank*, 754 F.2d 452 (2d Cir. 1985).

In the present case, plaintiff's Exhibit 7, which is the Vietnam dong section of the 1984 World Currency Year Book, together with the testimony of plaintiff's and defendant's experts, showed that an active unofficial or black market in dollars exists in Vietnam, and that the exchange rate of this market in November 1980 was 17 Vietnam dongs to the dollar. This is the proper rate to apply, rather than the effective rate, since the evidence showed that no individual could really trade at the effective rate set by the government of Vietnam.

Next, the Court must determine the interest the account earned. Plaintiff has alleged, but failed to prove, that the account drew 24% interest. Citibank's testimony showed that the account earned 19% interest, compounded daily.

Finally, the Court must trace the piaster deposit through the Vietnam currency conversions decided above. These conversion rates are not in dispute. They are as follows:

Sept. 22, 1975	500 piasters = 1 South Vietnam dong
May 3, 1978	.80 South Vietnam dongs = 1 Vietnam dong

The Court can now calculate the amount Citibank owes on the account. The starting point is the 3,000,000 piasters shown in the pass book on October 25, 1974.

October 25, 1974	3,000,000.00 piasters
September 22, 1975 principal plus interest at 19% compounded daily	3,584,408.14 piasters
September 22, 1975 conversion from piasters to South Vietnam dongs (500 piasters = 1 South Vietnam dong)	7,168.82 South Vietnam dongs
May 3, 1978 principal, plus interest at 19% compounded daily	11,771.64 Vietnam dongs
May 3, 1978 conversion from South Vietnam dongs to Vietnam dongs (.80 South Vietnam dongs = 1 Vietnam dong)	14,714.56 Vietnam dongs
November 17, 1980 principal, plus interest at 19% compounded daily	23,862.32 Vietnam dongs
November 17, 1980 conversion from Vietnam dongs to U.S. Dollars (17 dongs = 1 dollar)	$1,403.67

Defendant is ordered to pay plaintiff $1,403.67, plus statutory interest from November 17, 1980.

This opinion constitutes the findings of fact and conclusions of law required by FRCP 52(a).

APPENDIX D

12 U.S.C. § 601 (1982)

§ 601. Authorization, conditions and regulations

Any national banking association possessing a capital and surplus of $1,000,000 or more may file application with the Board of Governors of the Federal Reserve System for permission to exercise, upon such conditions and under such regulations as may be prescribed by the said board, the following powers: First. To establish branches in foreign countries or dependencies or insolar possessions of the United States for the furtherance of the foreign commerce of the United States, and to act, if required to do so, as fiscal agents of the United States.

* * * *

APPENDIX E

12 U.S.C. § 604a (1982)

§ 604a. Regulations authorizing exercise by foreign branches of usual powers of local banks; restrictions

Regulations issued by the Board of Governors of the Federal Reserve System under this subchapter, in addition to regulating powers which a foreign branch may exercise under other provisions of law, may authorize such a foreign branch, subject to such condition and requirements as such regulations may prescribe, to exercise such further powers as may be usual in connection with the transaction of the business of banking in the places where such foreign branch shall transact business. Such regulations shall not authorize a foreign branch to engage in the general business of producing, distributing, buying or selling goods, wares, or merchandise; nor, except to such limited extent as the Board may deem to be necessary with respect to securities issued by any "foreign state" as defined in section 632 of this title, shall such regulations authorize a foreign branch to engage or participate, directly or indirectly, in the business of underwriting, selling, or distributing securities.

APPENDIX F

12 U.S.C. § 461(b) (1982)

§ 461. Reserve requirements

(b) Additional definitions . . . reserves related to foreign obligations or assets; exemption for certain deposits . . .

* * * *

(2)(A) Each depository institution shall maintain reserves against its transaction accounts as the Board may prescribe by regulation solely for the purpose of implementing monetary policy—

(i) in the ratio of 3 per centum for that portion of its total transaction accounts of $25,000,000 or less, subject to subparagraph (C); and

(ii) in the ratio of 12 per centum, or in such other ratio as the Board may prescribe not greater than 14 per centum and not less than 8 per centum, for that portion of its total transaction accounts in excess of $25,000,000, subject to subparagraph (C).

(B) Each depository institution shall maintain reserves against its nonpersonal time deposits in the ratio of 3 per centum, or in such other ratio not greater than 9 per centum and not less than zero per centum as the Board may prescribe by regulation solely for the purpose of implementing monetary policy.

(C) Beginning in 1981, not later than December 31 of each year the Board shall issue a regulation increasing for the next succeeding calendar year the dollar amount which is contained in subparagraph (A) or which was last determined pursuant to this subparagraph for the purpose of such subparagraph, by an amount obtained by multiplying such dollar

amount by 80 per centum of the percentage increase in the total transaction accounts of all depository institutions. The increase in such transaction accounts shall be determined by subtracting the amount of such accounts on June 30 of the preceding calendar year from the amount of such accounts on June 30 of the calendar year involved. In the case of any such 12-month period in which there has been a decrease in the total transaction accounts of all depository institutions, the Board shall issue such a regulation decreasing for the next succeeding calendar year such dollar amount by an amount obtained by multiplying such dollar amount by 80 per centum of the percentage decrease in the total transaction accounts of all depository institutions. The decrease in such transaction accounts shall be determined by subtracting the amount of such accounts on June 30 of the calendar year involved from the amount of such accounts on June 30 of the previous calender year.

(D) Any reserve requirement imposed under this subsection shall be uniformly applied to all transaction accounts at all depository institutions. Reserve requirements imposed under this subsection shall be uniformly applied to nonpersonal time deposits at all depository institutions, except that such requirements may vary by the maturity of such deposits.

* * * *

(6) The requirements posed under paragraph (2) shall not apply to deposits payable only outside the States of the United States and the District of Columbia, except that nothing in this subsection limits the authority of the Board to impose conditions and requirements on member banks under section 25 of this Act [12 U.S.C. 601 et seq.] or the authority of the Board under section 3105 of this title.

* * * *

APPENDIX G

12 U.S.C. §§ 1811, 1813 (1982)

§ 1811. Creation of Corporation; duties

There is created a Federal Deposit Insurance Corporation (hereinafter referred to as the "Corporation") which shall insure, as hereinafter provided, the deposits of all banks which are entitled to the benefits of insurance under this chapter, and which shall have the powers hereinafter granted.

* * * *

§ 1813. Definitions

As used in this chapter—

(d) The term "national member bank" means any national bank located in any of the States of the United States, the District of Columbia, any Territory of the United States, Puerto Rico, Guam, American Samoa, or the Virgin Islands which is a member of the Federal Reserve System.

* * * *

(*l*) The term "deposit" means—

* * * *

(5) such other obligations of a bank as the Board of Directors, after consultation with the Comptroller of the Currency and the Board of Governors of the Federal Reserve System, shall find and prescribe by regulation to be deposit liabilities by general usage, except that the following shall not be a deposit for any of the purposes of this chapter or be included as part of the total deposits or of an insured deposit:

(A) any obligation of a bank which is payable only at an office of such bank located outside of the States of the United States, the District of Columbia, Puerto Rico, Guam, American Samoa, the Trust Ter-

ritory of the Pacific Islands, and the Virgin Islands; and

(B) any international banking facility deposit, including an international banking facility time deposit, as such term is from time to time defined by the Board of Governors of the Federal Reserve System in regulation D or any successor regulation issued by the Board of Governors of the Federal Reserve System.

* * * *

APPENDIX H

35 FEDERAL REGISTER 2768 (1970)

PART 204—RESERVES OF MEMBER BANKS

PART 217—INTERESTS ON DEPOSITS

Deposits in Foreign Branches

§ 204.112 Deposits in foreign branches guaranteed by domestic office of member bank.

(a) In accepting deposits at branches abroad, some member banks are reported to have entered into agreements from time to time with depositors that in effect guarantee payment of such deposits in the United States if the foreign branch is precluded from making payment. The question has arisen whether such deposits are subject to this Part 204 and Part 217 of this chapter (Regs. D and Q), and this interpretation is intended as a clarification.

(b) Section 19 of the Federal Reserve Act provides that the limitations prescribed therein on rates of interest paid on deposits are not applicable to deposits of a member bank "payable only at an office thereof located outside the States of the United States and the District of Columbia" (12 U.S.C. 371a). The Board ruled in 1918 that the requirements of section 19 as to reserves to be carried by member banks also do not apply to foreign branches (1918 Federal Reserve Bulletin 1123).

(c) In the Board's judgment, the applicability of these exemptions from Regulation Q and Regulation D is limited to deposits in foreign branches as to which the depositor is entitled, under his agreement with the bank, to demand payment only outside of the United States, regardless of special circumstances. Said exemptions are intended principally to enable foreign branches of U.S.

banks to compete on a more nearly equal basis with other banks in foreign countries in accordance with the laws and regulations of those countries. A customer who makes a deposit that is payable solely at a foreign branch assumes whatever risk may exist that the foreign country might impose restrictions on withdrawals. When payment of a deposit in a foreign branch is guaranteed by a promise of payment at a banking office in the United States if not paid at the foreign office, the depositor no longer assumes such risk, but enjoys substantially the same rights as if the deposit had been made in a U.S. office of the bank. To assure the effectiveness of Regulations D and Q and to prevent evasions thereof, the Board considers that such guaranteed foreign-branch deposits must be subject to those regulations.

(d) Accordingly, a deposit in a foreign branch of a member bank that is guaranteed by a domestic office is subject to the interest rate limitations and reserve percentages of Regulations Q and D the same as if the deposit had been made in the domestic office.

(e) This interpretation is not designed in any respect to prevent the head office of a U.S. bank from repaying borrowings from, making advances to, or supplying capital funds to its foreign branches.

§ 217.146 Deposits at foreign branches guaranteed by domestic office of member bank.

For text of this interpretation see § 204.112 of this subchapter.

* * * *

APPENDIX I

COMMITTEE ON BANKING REGULATIONS AND SUPERVISORY PRACTICES: REVISED BASLE CONCORDAT ON PRINCIPLES FOR THE SUPERVISION OF BANKS' FOREIGN ESTABLISHMENTS*

Introductory comment to the revised Concordat

The Committee on Banking Regulations and Supervisory Practices was inaugurated in 1975 under the auspices of the Bank for International Settlements in recognition of the growing importance of the international banking system to the functioning of the world economy. The formation of the Committee represented a pioneering effort to foster greater coordination and cooperation among banking supervisors in the industrial countries in the interest of a healthy international banking system. Among the first tasks undertaken by the Committee was to seek some general agreement about the respective roles of home country and host country supervisors and to assure that banking organizations operating in international banking markets were all supervised institutions. That agreement was contained in a document that came to be known as the Concordat and was concerned with relative supervisory responsibilities with respect to solvency, liquidity and foreign exchange opera-

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* [The introductory comment to the revised Concordat was prepared for *International Legal Materials* by Frederick R. Dahl of the U.S. Federal Reserve System.

[The text of the revised Concordat begins at I.L.M. page 901. The original 1975 Concordat, released to the public in March 1981, is reproduced in International Monetary Fund, *International Capital Markets: Recent Developments and Short-Term Prospects, 1981*, Occasional Paper No. 7 (August 1981), pp. 29-32.

[The U.S. Comptroller of the Currency and the Federal Reserve Board announced amendments to their minimum capital guidelines on June 13, 1983. They are reproduced at I.L.M. page 930.]

tions. The principles contained in the original Concordat were subscribed to not only by the supervisors represented on the Committee but subsequently by the major supervisory authorities around the world as well.

A revision of the Concordat was recently undertaken by the Committee to clarify certain aspects and to make it better reflect the experience of the intervening years. The revised Concordat, which was made public in early June, emphasizes that it is concerned only with supervisory responsibilities and not with those of lenders of last resort. It also incorporates the principle of supervising banking institutions on a consolidated world wide basis. The mutuality of responsibilities between home and host country authorities is underscored as is the consequent need for cooperation and coordination between them.

COMMITTEE ON BANKING REGULATIONS AND SUPERVISORY PRACTICES [*]

Principles for the supervision of banks' foreign establishments

* * * *

IV. *Aspects of the supervision of banks' foreign establishments*

The supervision of banks' foreign establishments is considered in this report from three different aspects: solvency, liquidity, and foreign exchange operations and positions. These aspects overlap to some extent. For instance, liquidity and solvency questions can shade into one another. Moreover, both liquidity and solvency con-

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* [Reproduced from the text provided by the Board of Governors of the Federal Reserve System. The document is dated May 1983.

[The Basle Committee is composed of representatives from twelve industrial countries—Belgium, Canada, the Federal Republic of Germany, France, Italy, Japan, Luxembourg, the Netherlands, Sweden, Switzerland, the United Kingdom, and the United States.]

siderations arise in the supervision of banks' foreign exchange operations and positions.

1. *Solvency*

The allocation of responsibilities for the supervision of the solvency of banks' foreign establishments between parent and host authorities will depend upon the type of establishment concerned.

For branches, their solvency is indistinguishable from that of the parent bank as a whole. So, while there is a general responsibility on the host authority to monitor the financial soundness of foreign branches, supervision of solvency is primarily a matter for the parent authority. The "dotation de capital" requirements imposed by certain host authorities on foreign branches operating in their countries do not negate this principle. They exist firstly to oblige foreign branches that set up in business in those countries to make and to sustain a certain minimum investment in them, and secondly, to help equalise competitive conditions between foreign branches and domestic banks.

For subsidiaries, the supervision of solvency is a joint responsibility of both host and parent authorities. Host authorities have responsibility for supervising the solvency of all foreign subsidiaries operating in their territories. Their approach to the task of supervising subsidiaries is from the standpoint that these establishments are separate entities, legally incorporated in the country of the host authority. At the same time parent authorities, in the context of consolidated supervision of the parent banks, need to assess whether the parent institutions' solvency is being affected by the operations of their foreign subsidiaries. Parental supervision on a consolidated basis is needed for two reasons: because the solvency of parent banks cannot be adequately judged without taking account of all their foreign establishments; and because parent banks cannot be indifferent to the situation of their foreign subsidiaries.

For joint ventures, the supervision of solvency should normally, for practical reasons, be primarily the responsibility of the authorities in the country of incorporation. Banks which are shareholders in consortium banks cannot, however, be indifferent to the situation of their joint ventures and may have commitments to these establishments beyond the legal commitments which arise from their shareholdings, for example through comfort letters. All these commitments must be taken into account by the parent authorities of the shareholder banks when supervising their solvency. Depending on the pattern of shareholdings in joint ventures, and particularly when one bank is a dominant shareholder, there can also be circumstances in which the supervision of their solvency should be the joint responsibility of the authorities in the country of incorporation and the parent authorities of the shareholder banks.

2. *Liquidity*

References to supervision of liquidity in this section do not relate to central banks' functions as lenders of last resort, but to the responsibility of supervisory authorities for monitoring the control systems and procedures established by their banks which enable them to meet their obligations as they fall due including, as necessary, those of their foreign establishments.

The allocation of responsibilities for the supervision of the liquidity of banks' foreign establishments between parent and host authorities will depend, as with solvency, upon the type of establishment concerned. The host authority has responsibility for monitoring the liquidity of the foreign bank's establishments in its country; the parent authority has responsibility for monitoring the liquidity of the banking group as a whole.

For branches, the initial presumption should be that primary responsibility for supervising liquidity rests with the host authority. Host authorities will often be best

equipped to supervise liquidity as it relates to local practices and regulations and the functioning of their domestic money markets. At the same time, the liquidity of all foreign branches will always be a matter of concern to the parent authorities, since a branch's liquidity is frequently controlled directly by the parent bank and cannot be viewed in isolation from that of the whole bank of which it is a part. Parent authorities need to be aware of parent banks' control systems and need to take account of calls that may be made on the resources of parent banks by their foreign branches. Host and parent authorities should always consult each other if there are any doubts in particular cases about where responsibilities for supervising the liquidity of foreign branches should lie.

For subsidiaries, primary responsibility for supervising liquidity should rest with the host authority. Parent authorities should take account of any standby or other facilities granted as well as any other commitments, for example through comfort letters, by parent banks to these establishments. Host authorities should inform the parent authorities of the importance they attach to such facilities and commitments, so as to ensure that full account is taken of them in the supervision of the parent bank. Where the host authority has difficulties in supervising the liquidity, especially in foreign currency, of foreign banks' subsidiaries, it will be expected to inform the parent authorities and appropriate arrangements will have to be agreed so as to ensure adequate supervision.

For joint ventures, primary responsibilities for supervising liquidity should rest with the authorities in the country of incorporation. The parent authorities of shareholders in joint ventures should take account of any standby or other facilties granted as well as any other commitments, for example through comfort letters, by shareholder banks to those establishments. The authorities in the country of incorporation of joint ventures

should inform the parent authorities of shareholder banks of the importance they attach to such facilities and commitments so as to ensure that full account is taken of them in the supervision of the shareholder bank.

Within the framework of consolidated supervision, parent authorities have a general responsibility for overseeing the liquidity control systems employed by the banking groups they supervise and for ensuring that these systems and the overall liquidity position of such groups are adequate. It is recognised, however, that full consolidation may not always be practicable as a technique for supervising liquidity because of differences of local regulations and market situations and the complications of banks operating in different time zones and different currencies. Parent authorities should consult with host authorities to ensure that the latter are aware of the overall systems within which the foreign establishments are operating. Host authorities have a duty to ensure that the parent authority is immediately informed of any serious liquidity inadequacy in a parent bank's foreign establishment.

* * * *

(2)

Supreme Court, U.S.
FILED
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No. 88-1031

In The

Supreme Court of the United States

October Term, 1988

CITIBANK, N.A.,

Petitioner,

v.

NGOC QUANG TRINH,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS RESTATED

1. Whether the Supreme Court should grant certiorari based upon an issue that was not specifically preserved in the Court of Appeals.

2. Whether a Uniform Federal Rule of decision should apply to a contractual dispute between private parties in which the Federal interest is speculative and remote in possibility.

3. Whether a simple waiver executed by foreign Branch depositors would avoid liability being placed on the U.S. Parent Bank.[1]

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[1] Rule 28.1 of the Supreme Court is not applicable to Respondent.

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BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

This Court is being asked to review a judgment against Petitioner International Bank in the amount of $1403.67 plus pre-judgment interest of $1792.69 for a total of $3196.36. The following unbiased rendition of the facts in this case is taken verbatim from Judge Gilmore's opinion in the United States District Court Eastern District of Michigan who heard this case without a jury in August of 1985. *Trinh v. Citibank,* 623 F. Supp. 1526 (E.D. Mich. 1985).

> On July 25, 1974, Quang Quy Trinh, plaintiff's father, opened a "Golden Pass Book Account" at Citibank, Saigon, a branch of defendant Citibank, N.A. The account was a joint account in his name and the name of his son, Trinh. The initial deposit was of two million piasters. On October 25, 1974, Trinh's father made a deposit of million piasters.
>
> At the time Trinh's father opened this account, Trinh was a student in Michigan. He never returned to Vietnam. He became a United States citizen in 1979. Trinh testified that his father told him about the account and that he understood the account was for him and for his education.
>
> On April 24, 1975, Citibank Saigon closed its operations, leaving its keys at the U.S. Embassy. American and Vietnamese employees of the bank fled the country. On April 30, 1975, the South Vietnamese government in Saigon fell. On May 1, 1975, the revolutionary forces announced their victory and the creation of a Provisional Revolutionary Government.
>
> Shortly after the fall of Saigon, plaintiff's father was placed in a re-education camp. After his release in 1980, he sent the Citibank Saigon passbook to his

son in Michigan. In May 1980, Trinh called the International Division of Citibank in New York to inquire about the deposit. Trinh was told that the National Bank of Vietnam was now responsible for the deposit. On November 5, 1980, Trinh wrote to Walter Winston, chairman of Citibank, expressing dissatisfaction with this reply, and K.S. Lee, of Citibank, replied on November 17, 1980 that the National Bank of Vietnam was responsible for the Golden Passbook deposit.

See Pet. Appendix C pp. 37a-38a.

This case is in all material respects factually identical to and relies as legal precedent upon a case decided almost eight years ago by the Court of Appeals for the Second Circuit. *Vishipco Line v. Chase Manhattan Bank, N.A.*, 660 F.2d 854 (2nd Cir. 1981), *cert. denied*, 459 U.S. 976 (1982). A total of seven Federal Judges in the 2nd and 6th Circuits have held that New York International Banks operating as branch banks in Saigon, Vietnam at the time of the Communist insurgency and the pull-out of American commerical and military interest (1975) remain liable to their branch-depositors in the United States. There was one dissent in this case in the 6th Circuit Court of Appeals.

This is not a sudden or revolutionary pronoucement. Rather, it is the application of Judge Cardozo's famous opinion in *Sokoloff v. National City Bank*, 239 N.Y. 158, 145 N.E. 917 (1924). As the district court put it in this case:

> "[Sokoloff] established the principle that the home office is liable on a deposit placed in its foreign branch when the branch has wrongfully failed to return the deposit." (623 F.Supp. 1526; App. C to Pet., pp. 38a-39a).

See Vishipco, Sokoloff, and most recently *Edelmann v. Chase Manhattan Bank, N.A.,* 856 F.2d 322, 335 (1st Cir. 1988). *Sokoloff* has provided the basic rule for decision of these issues of branch liability since it was handed down. In that sense, uniformity of law is already present as a result of the wide acceptance of *Sokoloff.*

It is noted above that just last year (1988) the principles of *Sokoloff, Vishipco* and *Trinh* were applied in the 1st Circuit. In *Edelmann,* supra, certificates of deposit were placed in Chase Manhattan branch bank in Havana in 1958 just before Castro gained complete control of the island and the 1st Circuit held that under the circumstances Chase Manhattan and not the depositors bore the risk of the deposits being expropriated. Judge Wisdom in *Edelmann* aptly and succinctly stated the principles of *Sokoloff, Vishipco,* and *Trinh* as follows:

> *Sokoloff* is distinguishable on the facts from the instant case, but its underlying premise is apposite here. When a branch is closed, the depositor has a claim against the parent bank: the situs of the debt represented by the deposit "springs back" to the home office. Ultimate liability for the debt of a branch rests upon the parent bank. *Edelmann,* 856 at 335.

Despite petitioner's efforts (See Pet. p.6) the case of *Wells Fargo Asia Limited v. Citibank N.A.,* 852 F.2d 657, 659 (2nd Cir. 1988) is not a companion case of *Trinh* or the progeny of *Sokoloff* and *Vishipco.* The depositor in *Wells Fargo* was able to recover against the parent bank in New York due to specific language in the agreement with the parent bank that was not present in this case or *Vishipco.*

The following issues were advanced and failed by the New York Banks in *Vishipco* and *Trinh*:

ISSUE	*LAW APPLIED*	*RESULT*
A. *VISHIPCO*		
1) Deposit Contract Precluded Recovery	New York	Recovery Allowed *CHASE* is liable
AFFIRMATIVE DEFENSES		
2) Vietnamese Govt is Successor in interest to *Chase* and assumes debt.	Vietnam	No Evidence
*3) Act of State Doctrine	Vietnam	Not supported by evidence
4) Impossibility of Performance and Force Majeur.	Vietnam	Not supported by the evidence
B. *TRINH*		
1) Deposit Contract Precluded Recovery *Affirmative Defenses*	**Vietnam	Recovery allowed Citibank liable
2) Assumption of Assets By national Bank of Vietnam	Vietnam	Not Proved
3) Force Majeur	Vietnam	Not Proved
4) Confiscation of Assets	Vietnam	Not Proved

* The Act of State Doctrine was advanced to the U.S. Supreme Court in *Chase* and Cert. was denied based on this issue alone. See Pet. p. 21. ** In *Trinh* Citibank produced the only expert testimony on Vietnam Law but lost on the application of the Law of Vietnam to the case.

Having failed in the above Petitioner seeks to advance a novel theory of applying either federal common law or pre-emption by federal statutes to defeat liability in this case. The theory is novel in the sense that federal common law has never been applied to this body of law that has been around since the Russian Revolution, See *Sokoloff*. The urgency upon which Petitoner advances this new theory is thwarted by the fact that 65 years have passed since Justice Cardozo wrote *Sokoloff* and the application of contract law to the relationship between a foreign depositor and the foreign branches of New York banks has not seen the collapse of the International Banking business.

REASON FOR DENYING THE WRIT

Central to petitioner's strategy in the lower Courts was to distinguish this case from Judge Mansfield's opinion in *Vishipco* by establishing that unlike *Vishipco*, the law of Vietnam was applicable to the deposit agreement in this case. Accepting Citibank's invitation, both the district Court and the 6th Circuit applied the law of Vietnam, but found the result reached by application of the law no different than the result reached in *Vishipco* by application of New York law. Under the facts in each instance the bank home office was liable to its foreign branch bank depositors when the foreign branch closed. For the first time in this case Petitioner advances the issue of the application of federal common law principles or the pre-emptive federal statutes and regulations. See Pet. pp. 12-13. One cannot blame Petitioner for trying because in reality they have nowhere to go. Certiorari

was denied in *Vishipco* based on the presentation of the Act of State Doctrine by the Solicitor General. Likewise, Petitioner was unsuccessful with this Act of State Doctrine in the 6th Circuit. All other issues are bound up in the facts of the case and there is uniformity in the 1st, (*Edelmann*, supra.) 2nd (*Vishipco*, supra.) and the 6th Circuits, this matter. Despite having nowhere else to go to, the Supreme Court is a Court of Review and does not spend time on questions that are being presented for the first time.

Assuming arguendo, that the Court does not deny the petition solely on the basis of failure to raise the issue below there are numerous other reasons enumerated below for this Court not to grant its extraordinary and discretionary jurisdiction.

A. THIS COURT DOES NOT REVIEW CASES BASED UPON QUESTIONS NOT PRESERVED IN THE LOWER COURTS

The trial record is void of any request by the Petitioner that the Lower Court interpret pre-emptive Federal Statutes and regulations and/or apply federal common law to find U.S. Banks not liable for the confiscations of deposits in ...eir foreign branch banks.

It is not necessary to wait until the case reaches the Supreme Court before requesting the application of federal common law or the application of pre-emptive federal statutes. In *Edelmann*, supra the Court rejected applying federal common law to the issue of expropriation of a foreign branch bank. The *Edelmann* Court stated:

> Nothing in the language of the statute that gives us jurisdiction (The Edge Act, 12 U.S.C. 632) would support the development of a federal common law response to the substantive issue in this case. *Edelmann* 856 F.2d at 325 N.14.

[See cases cited in *Edelmann* 856 F.2d at 325 N.14 that demonstate the application of federal common law or pre-emptive federal statutes are matters that are brought before Federal Courts lower than the Supreme Court.]

Petitioner makes note of 12 U.S.C. 461(b)(6)(1982) and 35 Fed. Reg. 2768 (1970) as establishing that U.S. banks are not responsible for the actions of foreign sovereigns. See Pet. pp. 7-8, 12-13 N.10 Petitioner argues here for the first time the notion that this could be considered a pre-emptive federal statute and regulation that would lead the Court not to apply the law of Vietnam or any state forum but to hold that the statute and Regulation [12 U.S.C. § 461(b)(6)(1982) and 35 Fed. Reg. 2768(1970)] demand pre-emption that would defeat the liability of the parent bank in the U.S. Again the record is void of this argument being made in the Lower Courts or any argument specifically asking for the application of federal common law.

The exact questions that the Petitioner and the U.S. Govern as Amicus Curiae raised below are attached hereto as Appendices A & B. The only question raised below that even remotely resembles the question raised before this Court is (iii) for the Petitioner. However, the arguments made on behalf of question (iii) support respondents contention that the issue of pre-emption of federal statutes or regulations or establishing federal common law in this area was not raised below. See Petitioners

arguments in support of (iii) attached hereto as Appendix C.

For the first time in this Court, Petitioner invites this Court to craft federal common law principles or else find pre-emptive federal statutes and regulations which upset the result reached by application of Vietnam law. This is all new, and the trial record contains nothing which would aid in review of such a claim, for the claim has never before been advanced or litigated in this case. As explained in *Duignan v. U.S.*, 274 U.S. 195 (1927):

> This Court sits as a Court of Review. It is only in exceptional cases coming here from the Federal Courts that questions not pressed or passed upon below are reviewed. 274 U.S. at 200.

Surely there is nothing about a $3,196.36 judgment on a deposit contract which justifies a departure from ordinary review of this case.

B. FEDERAL COMMON LAW PRINCIPLES ARE NOT APPLICABLE TO THE LITIGATION BETWEEN PRIVATE PARTIES IN THIS MATTER

As stated in many places and in many instances there is "no federal general common law" *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Federal common law not being general or common it has been created in instances that are "few" and "restricted" See *Wheelden v. Wheeler*, 373 U.S. 647, 651 (1962).

Federal common law is not applied to disputes in which the federal interest is "speculative" or "remote in possibility". See *Bank of American Nat. Trust & Sav. Assn. v. Parnell*, 352 U.S. 29, 33-34 (1956). Federal common law

is appropriate in areas involving "uniquely federal interest". Pet. p. 13 citing *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510 (1988).

The following cases contained within the petition reveal the factual contrast between this matter and those few chosen disputes where federal common law has been applied due to the disputes direct impact on federal interests.

In *Texas Industries Inc. v. Radcliff Materials*, 451 U.S. 630, 640 (1981) See Pet. p. 13, the Supreme Court declined to create federal common law to interpret the Sherman Act or Clayton Act as providing a right of contribution among joint-tortfeasors. No one can deny the unique federal interest in anti-trust matters. However, as *Texas Industries* reveals the unique federal interest by itself is not enough to allow the Federal Courts to create federal common law. The narrowness of the field of federal common law is spelled out clearly in *Texas Industries* as follows:

> Rather, absent some congressional authorizations to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, or our relations with foreign nations and admiralty cases. In these instances, our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States are intimately involved or because the interstate nature of the controversy makes it inappropriate for state law to control. *Texas Industries*, 451 U.S. at 641.

1. "Right and obligations of the United States" Id.

This right is surely not implicated by the relationship between depositors and their banks. Federal Regulation of the Banking Industry in and of itself does not change the fact that Mr. Trinh and Citibank, N.A. are private citizens.

2. "Interstate and international disputes implicating the conflicting rights of states or our relations with foreign nations" Id.

Again nowhere in the body of law encompassing parent bank liability when foreign branch deposits are expropriated is there found U.S. international relationships being implicated. Petitioner argues to the contrary but Petitioner's argument is based on speculation "What might happen if" speculation which does not directly impact federal interest.

3. Adimiralty Id.

Of course, there are no admiralty issues here.

In *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510 (1988) See Pet. p. 13. The Supreme Court found that the civil liabilities arising out of federal procurement contracts involved "uniquely federal interest" because these contracts are wrapped up in getting the "Governments work done." *Boyle* at 2514.

In *United States v. Kimball Foods, Inc.*, 440 U.S. 715 (1977) See Pet. p. 13. The Supreme Court was not persuaded that a Uniform Federal Rule was necessary so as to give the U.S. government priority over other creditors in the administration of SBA or FHA loan programs.

Even controversies directly affecting the operations of federal programs although governed by Federal Law do not require uniform federal rules. *Kimball Foods* at 727-728.

In *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-367 (1943) See Pet. p. 13 the Supreme Court said that the rights and obligations of the United States with respect to commercial paper must be governed by uniform federal rule. Again we draw this Courts attention to who the litigants are in *Clearfield* as opposed to this case as well as the direct impact the issue of the rights and obligations of the United States with respect to commercial paper has on the function of the Federal government.

In *Illinois v. City of Milwaukee*, 406 U.S. 91, 105 N.6 (1972) The pollution of a body of water bounded by four states touches the basic interests of federalism so as to implicate federal common law.

The above cases all contained within Petitioners petition make clear the direct impact the controversy must have on the U.S. government before this Court deems it necessary to step outside the dictates of *Erie v. Tompkins* supra, and create a Uniform Federal Rule of Decision. The direct impact in this matter is negated by the 65 year history of *Sokoloff* and its progeny as well as the private nature of this dispute between private litigants.

Under the banner of uniformity, already present under the *Sokoloff* line of cases, Citibank really advocates a change of the result which produces home office liability in favor of a rule banning such liability. Whether termed "federal common law" or else some ill-defined federal pre-emption theory, Citibank wants relief from

the result of this case under *Sokoloff*. But there in no reason for this Court to initiate such a change and especially on the basis of Citibank's petition.

First is the matter of who should do the law making. The Court is being asked to enter a legislative thicket and redraft rules governing bank and depositior relationships. Assessment of the policy considerations underlying such a change is a task best left to Congress. Since *Sokoloff*, neither Congress nor this Court has seen the need for "federalization" of the principles of bank and depositor liability or alteration of the principles of law which have involved in this area in *Sokoloff* and other cases. Federal pre-emption ordinarily emanates from a Congressional declaration of intent. Here, there has been no such declaration.

Citibank offers no reason for this Court to fill any lawmaking void. World turmoil is assuredly not a recent phenomenon, and there is no argument that the decision in *Sokoloff* or *Vishipco* have leaped urgently to the forefront. Likewise, the dire consequences predicted for U.S. banks as a result of the decisions in *Sokoloff*, *Vishipco*, and this case, have not come to pass. By Citibank's authoritative report, at Pet., p. 2, U.S. foreign branch bank operations have continued to accept ever-increasing volumes of deposits and have done so despite the current state of the law.

The rule of federal law which Citibank proposes will not change preexisting law. Page 18 of the Petition prays for the following:

> "Consistent with federal law and policy, this rule should provide that a bank, *unless it has expressly*

> *agreed otherwise,* may not be held liable for deposits with its branch in a foreign country when the foreign government prevents the branch from repaying such deposits."

This is simply a reformation of the 6th Circuit's ultimate decision here. That court was of the view that, by full disclosure, banks could define the extent of home office liability and thus, by contract, control the scope of such liability. Citibank agrees that the scope of liability is to be determined by contract, but parts company with the Sixth Circuit in suggesting a preexisting presumption. Citibank would prefer to start with a presumption of no home office liability and have the presumption subject to such exceptions when the bank affirmatively assumes the liability.

Citibank's continuing willingness to define home office liability by reference to contract law principles undercuts its insistence on absolute uniformity and its demand for a federalized law of bank and depositor relationships. Even under Citibank's proposal, home office liability will ultimately be a subject of contract, as it is now. In the final analysis, Citibank seeks the writ in order to debate how to adequately disclaim or acknowledge liability ***as a matter of contract law*** which it still proposes to be the paramount rule of decision. This is not a wise use of the certiorari jurisdiction, much less a set of facts calling for a radical court-initiated preemption of a longstanding body of case law that began with *Sokoloff.*

C. A SIMPLE WAIVER EXECUTED BY FOREIGN-BRANCH DEPOSITOR WOULD AVOID THE CONSEQUENCES OF THIS CASE ON PETITIONER.

As the 6th Circuit Court of Appeals suggested in this case, See Pet. Appendix A p. 13a, a simple waiver of the Vietnamese depositors right to proceed against the petitioners home office would give a different result. This case was resolved in favor of Respondent based upon the interpretation of the deposit agreement pursuant to Vietnamese Law. Can Petitioner deny that its business name in all the unstable areas of the world does not give it an advantage because depositors quite rightly assume that their money in a New York bank is more secure than a bank in Saigon, Manila, Beirut, Tehran, Havana etc. Would not the honest and fair procedure be to make all such foreign depositors sign a waiver that clearly states that your money is no safer in our New York branch than in your local bank if your country expropriates our branch assets in your country. See Appendix D for Respondents example of a waiver that would relieve Petitioner of future liability and save this Court from changing 65 years of legal precedent beginning with Judge Cardozas' opinion in *Sokoloff*, supra.

CONCLUSION

The decision below is correct and conforms with the uniform view among the circuits on all the issues that have been fairly presented and not presented in this Court for the first time to wit the application of federal common law. Despite the unfairness, federal common law

has no application to this dispute between private parties that is factually bound by the terms of the deposit agreement between the parties. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

STATEMENT OF THE ISSUES

(i) Should a U.S. bank's home office be held liable for deposits at a foreign branch when the branch itself is discharged from liability both by contract and by governing law?

(ii) Has a U.S. bank ceased operation at an overseas branch "voluntarily" – and not as a result of force majeure – when it has done so in anticipation of an impending hostile takeover of the city in which the branch does business, as part of an evacuation organized by the U.S. Government, and to save its employees from imminent peril?

(iii) Will courts in the United States require that a U.S. bank suffer a loss twice for an expropriated foreign branch – once when the branch is confiscated and again when depositors of the former branch seek payment from the bank's head office instead of from the government that seized the branch's assets?

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 86-1258

NGOC QUANG TRINH,

Plaintiff-Appellee,

v.

CITIBANK, N.A.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE

QUESTIONS PRESENTED

1. Whether the home office of a U.S. bank should be held liable for the loss of a depositor in a foreign branch that closed during wartime conditions, in the face of an imminent invasion by hostile forces, and that was later confiscated by the new government, without regard to the fact that the deposit agreement placed the risk of such loss on the depositor.

2. Whether a foreign government that confiscates a foreign branch of a U.S. bank should be presumed to have taken the entire branch, or only the assets of the branch and those liabilities that the foreign government has explicitly said it has taken.

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APPENDIX C

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CERTIFICATE OF SERVICE

APPENDIX D

WAIVER OF PARENT BANKS' LIABILITY IN THE EVENT THE COUNTRY WHERE BRANCH IS LOCATED EXPROPRIATES BRANCHS' ASSETS

I, depositor in **Citibanks'** foreign branch located in ___ understand that if my government in any way expropriates my assets held in **Citibanks** foreign branch bank then I understand that I have **no** remedy against **Citibanks'** Parent Bank in New York. Any remedies that might exist as a result of this expropriation are confined solely within the jurisdiction of my country.

_____

DEPOSITOR

(TRANSLATED IN THE LANGUAGE OF THE FOREIGN BRANCH COUNTRY)

_____

Supreme Court, U.S.
FILED
MAR 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1031

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CITIBANK, N.A.,

Petitioner,

v.

NGOC QUANG TRINH,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) 6
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1031

CITIBANK, N.A.,

Petitioner,

v.

NGOC QUANG TRINH,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF OF PETITIONER

We showed in the petition that the decision below (like the decision in the related case of *Wells Fargo*) raises an issue of great importance to the federal regulation of U.S. banks, the federal safety net constructed to protect the domestic banking system, and the stability and efficiency of international banking operations. Respondent makes no effort to refute these representations. He does not deny that the ruling of the court of appeals, if generally applied, would destroy the longstanding distinction between the domestic U.S. banking system and foreign operations of U.S. banks, which has formed the foundation for federal government regulation of foreign operations of U.S. banks since the founding of the federal reserve system. Nor does he try to reconcile the conflicting approaches and results reached by various state and lower federal courts in dealing with the issue presented here.

Rather, respondent urges the Court to deny certiorari by arguing that the precise formulation of the issue pre-

sented here was not raised below, that this is not an appropriate case for application of federal law, that the Sixth Circuit decision has precedent in a 1924 decision of the New York Court of Appeals, and that any problem created by the decision below could easily be corrected by contract. None of these points has any merit.

1. Respondent's principal argument against the grant of certiorari is that there was no claim of the primacy of federal law in the courts below. Br. in Opp. at 7-8. But both Citibank and the United States government attempted to persuade the court of appeals through a variety of means to accept one central proposition: that whatever rule of liability the court adopted in this case, it must be consistent with federal law and policy. These submissions placed the court of appeals on notice that a federal claim was at issue and afforded full opportunity to consider the paramount federal interests at stake here.

In its brief in the court of appeals, Citibank argued that "under U.S. law, Citibank is not liable for deposits at its expropriated Saigon branch." Brief of Citibank on Appeal at 29, *Trinh v. Citibank, N.A.*, 850 F.2d 1164 (6th Cir. 1988) (No. 86-1258).[1] In support of that argument, Citibank pointed to a number of respects in which "U.S. banking laws . . . recognize the separation . . . between a foreign branch and the bank's head office," (*id.* at 31), including the federal banking law provisions exempting foreign branch deposits from U.S. reserve requirements and from Federal Deposit Insurance Corporation insurance assessments and provisions requiring that separate accounts be maintained for foreign branch operations of U.S. banks. And in criticizing the *Vishipco* decision, Citibank explained that a rule of home office liability would (a) "disturb the domestic legal

[1] To be sure, Citibank also argued that it was not liable based on the contract and that it was not liable under Vietnamese law. Such arguments were made because in Citibank's view, proper interpretation of the contract and application of Vietnamese law would have resulted in a ruling that did *not* contradict federal banking law and policy.

and policy framework for international banking," (b) cause U.S. banks "to reduce or eliminate their foreign operations, thus adversely affecting U.S. foreign trade," (c) "adversely affect international banking markets and the role U.S. banks can play in facilitating flows of finance and credit," and (d) "discourage, in emergency conditions, responsible corporate actions abroad in cooperation with U.S. government authorities" (*id.* at 45-46).[2]

For its part, the U.S. government urged that the district court's decision holding Citibank liable contradicted important federal policies reflected in federal standards. In its *amicus* brief, the government explained that the "'springing debt' theory in this case is contrary to the interests of the United States" because it "could impair the financial condition of [American] banks" and "[i]n an extreme case, . . . could also affect the credit and insurance facilities of the federal government." Brief for the United States as Amicus Curiae at 3, 23, *Trinh*, *supra* (footnote omitted). In addition, the government argued that the approach taken by the district court (and later adopted by the court of appeals) was inconsistent with that of federal bank regulators and would "make it substantially more difficult for U.S. bank regulatory agencies to estimate the risk to liquidity posed by the operation of foreign branches. When supervising banks with foreign branches, bank regulators have acted on the general understanding that foreign branches will not be required to honor deposit contracts payable in local currency when the assets of the branch have been confiscated by local authorities." *Id.* at 24-25. Finally, the government expressed concern that holding Citibank liable in these circumstances would deter U.S. banks "from establishing foreign branches" and thereby con-

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[2] Citibank also relied on the federal common law doctrine of Act of State, arguing that it was not liable under Act-of-State principles and that the imposition of liability would be inconsistent with the rulings of the Foreign Claims Settlement Commission (Brief of Citibank on Appeal at 35-41, *Trinh*, *supra*).

tradict the "fundamental purpose of the law permitting U.S. banks to establish branches abroad." *Id.* at 25.

Following issuance of the panel's opinion, Citibank and the United States renewed their arguments that holding Citibank liable was inconsistent with federal law and policy. In its Petition for Rehearing, Citibank argued that the panel's decision "overlooked federal law and policy when it imposed head office liability" (Reh. Pet. at 9) and "contradicts federal banking law and policy established by the United States Government . . . which was outlined in the *amicus* brief for the United States" (*id.* at 11-12). Similarly, the United States, in its Statement as Amicus Curiae in support of Citibank's rehearing petition, stated that "the decision of the panel majority is wrong" and that the government "continue[s] to adhere to the arguments set forth in [its previous] brief." *Id.*

In the face of these submissions, there is no merit to respondent's assertion that Citibank did not adequately present its federal law claim to the court of appeals. To be sure, Citibank's position in the court of appeals did not use the literal term "preemption" or "federal common law," but rather spoke of conflict and the need to have federal law and policy prevail. Even if this choice of words was read to recast the argument, this Court has repeatedly held that a litigant may refocus its federal claim in a certiorari petition by recasting the argument it made below. Thus, " '[p]arties are not confined here to the same arguments which were advanced in the courts below' " and may present any claim that is " 'only an enlargement' " of that previously raised or that is " 'so connected with [the issues below] in substance as to form but another ground or reason for alleging the invalidity of the [lower court's] judgment.' " [3]

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[3] *Illinois v. Gates*, 462 U.S. 213, 220 (1983) (quoting *Dewey v. Des Moines*, 173 U.S. 193, 197-98 (1899)). *See Braniff Airways, Inc. v. Nebraska State Bd. of Equalization & Assessment*, 347 U.S. 590, 598-99 (1954) (an issue may be raised in the Supreme Court,

In the present case, Citibank and the U.S. government plainly urged below that any rule of state or foreign law that imposed home office liability would be "in conflict with the policy of the United States," citing the very same statutes and regulations in support of their position that Citibank now relies upon in its petition. The Sixth Circuit held against Citibank not because it was unaware of the applicable federal law and policy, but because it believed that those considerations were insufficient to justify a different result. The court of appeals' decision thus constitutes a square rejection of the federal law arguments made by Citibank and the United States. Nothing in principles of sound judicial administration or fairness to the lower court suggests that that decision should be insulated from Supreme Court review.[4]

2. Respondent also argues that this case does not warrant application of federal law because the federal interests involved are too "speculative" and "remote." Br.

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even though the issue was "inexplicit" in the court below, so long as it was "within the clear intendment of" the argument that was presented in the lower court); *Youakim v. Miller*, 425 U.S. 231, 234-35 (1976) (petition permitted to press supremacy clause claim despite having raised only an equal protection claim below because the issue was "not foreign to the subject matter" of what had been litigated); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 159 n.5 (1980) (Court reviewed a takings clause claim on the basis of due process arguments made below); *Lear, Inc. v. Adkins*, 395 U.S. 653, 662 n.10, 678-80 (1969) (Court addressed the issue of federal preemption of the estoppel doctrine in patent litigation even though the appellant had sought only an "exception" to the doctrine in the lower court).

[4] We also note that the Supreme Court, in reviewing a federal court judgment, has jurisdiction to pass upon an issue that was not raised below. *See, e.g., Berkemer v. McCarty*, 468 U.S. 420, 443 (1984); 17 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure (Jurisdiction)* § 4036, at 35 (2d ed. 1988). The prudential rule that issues should be raised below "is not inflexible" (*Youakim v. Miller*, 425 U.S. at 234), and the Court has discretion to grant review of new issues in appropriate circumstances. Given the serious adverse consequences that would result from the court of appeals' decision in this case, review would be warranted here even if the issue had not been raised in the lower court.

in Opp. at 8. In so contending, respondent ignores the actions of Congress and federal bank regulators pursuant to their constitutional powers that have given concrete expression to the substantial federal interests at stake here.[5] Nor does petitioner even acknowledge the fact that, because this case centers upon the foreign commerce and foreign relations of the United States, it arises in an area constitutionally committed to federal control.[6] But perhaps the best illustration of the powerful federal interests in this case is found in the *amicus* brief of the United States government in the court of appeals, which explained that holding Citibank liable here would run contrary to U.S. interests in (1) preserving the basis for some 75 years of extensive regulation of foreign branches of U.S. banks by Congress, the Federal Reserve Board, and the Federal Deposit Insurance Corporation;[7] (2) protecting the U.S. banking system and federal safety net from "unwarranted and unforeseeable strains;"[8] (3) promoting the foreign commerce of the United States through an extensive system of foreign branches of U.S. banks;[9] and (4) furthering U.S. for-

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[5] *See, e.g.*, 12 U.S.C. § 461(b)(6) (1982) (App. at 62a-63a) (foreign branch deposits exempted from reserve requirements); 12 U.S.C. § 1813(*l*)(5)(A) (1982) (App. at 64a-65a) (foreign branch deposits exempted from ~~FDIC~~ insurance assessments).

[6] *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448, 451-56 (1979); *Zschernig v. Miller*, 389 U.S. 429, 436 (1968); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421-27 (1964); *United States v. Pink*, 315 U.S. 203, 233-34 (1942); *Hines v. Davidowitz*, 312 U.S. 52, 62 (1941); *Buttfield v. Stranahan*, 192 U.S. 470, 492-93 (1904); *Bowman v. Chicago & Northwestern Ry. Co.*, 125 U.S. 465, 482 (1888).

[7] Brief for the United States as Amicus Curiae at 24 & n.*, *Trinh*, *supra* (decisions such as that here "make it substantially more difficult" for U.S. regulators because such decisions are contrary to the regulators' "general understanding" and "d[o] not comport with [the banks'] treatment by federal banking regulators").

[8] *Id.* at 33.

[9] *Id.* at 25 (decisions such as that of the court of appeals here are contrary to "a fundamental purpose of the law permitting

eign relations interests, including its policies with respect to withdrawal of U.S. citizens from territory being invaded by hostile forces, discouraging foreign government expropriation in the absence of prompt, adequate, and effective compensation, and avoiding the issuance by U.S. courts of decisions contradicting international claims commissions established by the United States.[10]

In light of these powerful indications of overriding federal concern and interest, it is difficult to take seriously petitioner's assertion that the federal involvement in this case is "remote" or "speculative." Certainly this case is wholly different from those cited by respondent, such as *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), where the U.S. interest—although real—was merely in the nature of the regulation of essentially private conduct. Indeed, the extensive statutes and regulations involved here, and the direct effect upon federal regulators, make this case a far stronger one for application of federal law than was presented to this Court recently in *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510 (1988). In these circumstances, federal law should be applied to determine the extent of U.S. banks' liability in cases such as this, recognizing that state (or foreign) law would be superseded only to the extent that such law conflicted with federal law and policy.[11]

3. Respondent further suggests that the decision below is simply the latest in a long line of cases dating back to 1924 reaching a similar result. Br. in Opp. at 11-12. That is not true. Until quite recently the prevailing law

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U.S. banks to establish branches abroad," which is "to further the foreign commerce of the United States").

[10] *Id.* at 29-30.

[11] *See Boyle v. United Technologies Corp.*, 108 S. Ct. at 2516; *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 595 (1973); *Howard v. Lyons*, 360 U.S. 593, 597 (1959). *Cf. Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

was to the contrary of that set forth by the court of appeals.

It is true, to be sure, that in *Sokoloff v. National City Bank*, 239 N.Y. 158, 145 N.E. 917 (1924), the New York Court of Appeals held a U.S. bank liable for deposits held with its Russian branch after the Soviet takeover in 1917. In *Sokoloff*, however, the actual deposit had been made in dollars in New York, with instructions to credit an account in rubles in Petrograd, and federal and state courts shortly after *Sokoloff* limited that decision to its facts, ruling that U.S. financial institutions would *not* be liable for Russian deposits where the deposits themselves had been made in Russia.[12]

The New York State legislature also attempted to change the effect of *Sokoloff*. In 1937, New York enacted a statute making a New York bank liable for deposits payable at its foreign branch only to the extent that local banks in the host country would similarly be liable for losses arising from the host country's actions or laws.[13] In 1941, this statute was supplemented by the addition of a provision proportionately reducing the liability of any New York bank for the obligations of its foreign branch to the extent that a government not recognized by the U.S. government confiscates branch assets.[14] After *Vishipco*,[15] the statute was again revised to make explicit

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[12] *See Trinh v. Citibank, N.A.*, 850 F.2d at 1178 (Brown, J., dissenting) (App. at 31a); *Tillman v. National City Bank*, 118 F.2d 631 (2d Cir.), *cert. denied*, 314 U.S. 650 (1941); *Dougherty v. National City Bank*, 157 Misc. 849, 285 N.Y.S. 491 (Sup. Ct. 1935). *Accord Trujillo-M v. Bank of Nova Scotia*, 51 Misc. 2d 689, 273 N.Y.S.2d 700 (Sup. Ct. 1966), *aff'd without opinion*, 29 A.D.2d 847, 289 N.Y.S.2d 389, *cert. denied*, 393 U.S. 982 (1968).

[13] N.Y. Banking Law § 138(1) (McKinney 1971 & Supp. 1989).

[14] N.Y. Banking Law § 138(2) (McKinney 1971 & Supp. 1989).

[15] *Vishipco Line v. Chase Manhattan Bank, N.A.*, 660 F.2d 854 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982).

its application to national banks headquartered in New York.[16]

In truth, therefore, it was after 1981 that a new rule of liability for foreign branch deposits began to harden. In 1981, the Second Circuit issued its surprising decision in *Vishipco* based on no real authority other than a law review article introducing the so-called "spring and cling" doctrine into U.S. jurisprudence. Since that time, there have been five additional decisions (three within the last year) dealing with the issue of U.S. banks' liability for foreign branch deposits. In two of these (including the present case), courts followed the lead of *Vishipco* and held U.S. banks liable based on a presumption of home office liability.[17] Another decision held the U.S. bank liable based on what the courts (wrongly) found to be an explicit agreement by the U.S. bank to assume such liability.[18] In a fourth case, the court of appeals remanded the case for determination whether the U.S. bank entered into such an agreement.[19] Finally, one court (the New York Court of Appeals) held that the U.S. bank would not be held liable for foreign branch deposits when a foreign sovereign had seized the foreign branch.[20] In such circumstances, respondent's suggestion that "uniformity [is] already present under the *Sokoloff* line of cases" (Br. in Opp. at 11) cannot be given credence.

4. Finally, respondent asserts that "a simple waiver" inserted in deposit contracts would solve whatever prob-

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[16] 1984 N.Y. Laws ch. 689, § 1 (codified as amended at N.Y. Banking Law § 138 (McKinney Supp. 1989)).

[17] *Trinh v. Citibank, N.A.*, 850 F.2d 1164 (6th Cir. 1988); *Garcia v. Chase Manhattan Bank, N.A.*, 735 F.2d 645 (2d Cir. 1984).

[18] *Wells Fargo Asia Ltd. v. Citibank, N.A.*, 852 F.2d 657 (2d Cir. 1988), *petition for cert. pending*, No. 88-1260 (U.S. filed Jan. 25, 1989).

[19] *Edelmann v. Chase Manhattan Bank, N.A.*, 861 F.2d 1291 (1st Cir. 1988).

[20] *Perez v. Chase Manhattan Bank, N.A.*, 61 N.Y.2d 460, 463 N.E.2d 5, 474 N.Y.S.2d 689, *cert. denied*, 469 U.S. 966 (1984).

lems are caused by the decision below. Br. in Opp. at 14. In so asserting, respondent does not deal with Citibank's explanation (Pet. for Cert. at 19-20) of why such "simple waivers" cannot work.[21] For example, he does not suggest how his waiver could be inserted retroactively into agreements covering more than $200 billion in foreign branch deposits already outstanding. And it remains the fact that, as described in the petition in *Wells Fargo*, thousands of international banking transactions are conducted each day in an oral market that does not permit insertion of even "simple waivers."

Nor does respondent attempt to explain why U.S. courts would honor his "simple waiver" when they have failed to enforce other better-drafted attempts to limit home office liability. Thus, for example, in this very case the court of appeals undertook a tortured re-writing of a standard *force majeure* clause in Citibank/Saigon's deposit agreement. So long as U.S. courts look—as the court of appeals did here—solely to the unilateral expectations of depositors (whether theoretical or real), rather than to the federal requirements of the banking system, there is strong reason to doubt that *any* contractual provision will be construed to relieve U.S. banks from liability when foreign sovereigns seize or freeze the assets of the bank's foreign branches—a fact candidly acknowledged by the Second Circuit in *Vishipco*.[22]

CONCLUSION

The petition for writ of certiorari should be granted.

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[21] Respondent's suggested waiver is nevertheless instructive as to why no waiver could be "simple" and take care of the problems raised here. For example, respondent's simple waiver would not have applied in the present case for at least three independent reasons: (1) it was not Mr. Trinh's government (but rather Communist forces) who seized the Citibank branch; (2) Mr. Trinh held no assets in the Citibank branch (but rather was owed money by the branch); and (3) according to the "spring and cling" doctrine adopted by the court below, Mr. Trinh's "assets" left Vietnam with the last Citibank employees and thus were not "expropriated."

[22] 660 F.2d at 863-64.

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No. 88-1031

In the Supreme Court of the United States

OCTOBER TERM, 1989

CITIBANK, N.A., PETITIONER

v.

NGOC QUANG TRINH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether, contrary to the design of federal banking regulation, a United States bank may be held liable for deposits made with its branch in a foreign country when the foreign government prevents the branch from repaying those deposits.

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CITIBANK, N.A., PETITIONER

v.

NGOC QUANG TRINH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

Petitioner Citibank N.A. (Citibank) seeks review of a court of appeals' decision holding that Citibank's New York office is obligated to repay, in dollars, piaster-denominated deposits that a Vietnamese citizen placed with a Citibank branch formerly operated in Saigon, Republic of Vietnam. The court of appeals concluded that the deposit agreement, interpreted under Vietnamese law, absolved Citibank's Saigon branch of liability to respondent when the branch closed in anticipation of Saigon's imminent fall to hostile forces. The court further concluded, however, that respondent could seek repayment from Citibank's New York office because the deposit agreement did not expressly prohibit such an action. See Pet. App. 1a-32a.[1]

[1] Citibank also has filed a petition for a writ of certiorari seeking review of a decision of the United States Court of Appeals for the Second Circuit holding that Citibank's New York office is obligated to repay two Eurodollar

1. During the Vietnam conflict, Citibank maintained a branch office (Citibank/Saigon) in the Republic of Vietnam (South Vietnam).[2] Citibank operated Citibank/Saigon in accordance with Vietnamese law, which required that Citibank conduct its banking operations through a branch (rather than a subsidiary), that the branch keep all of its assets in the local currency (piasters), and that it maintain a specified level of paid-in capital reserves. Citibank/Saigon accepted passbook savings deposits from Vietnamese citizens, paid interest far in excess of that available on United States accounts, and required that depositors execute a standard deposit agreement setting forth withdrawal conditions and liability provisions. Pet. App. 2a-3a, 20a-21a.

On July 25, 1974, Quang Quy Trinh, a retired Vietnamese senator, opened a passbook savings account at Citibank/Saigon. He deposited 2 million piasters, named himself and respondent (his son who was attending school in Michigan) as joint account holders, and signed the branch's standard deposit agreement. The agreement stated that the deposits would be payable only at "Citibank's place of business," which was identified as "28-30 Nguyen Van Thinh, Saigon, 1 Republic of Vietnam," and that they would be payable only in the form of piasters. In addition, the deposit agreement stated that "Citibank does not accept responsibility for any loss or damage suffered or incurred by any depositor resulting from government orders, laws, levies, taxes, embargoes, moratoriums, exchange restrictions or from any other cause beyond its control." On October 25, 1974, Senator Trinh deposited an additional 1 million piasters. At that time, Citibank/Saigon paid interest on passbook savings accounts at a rate of 19% annually, compounded daily. Pet. App. 2a-3a, 20a-21a.

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deposits that a Singapore bank placed with a Citibank branch located in Manila, Republic of the Philippines. See *Citibank, N.A.* v. *Wells Fargo Asia Ltd.*, No. 88-1260. The Solicitor General has filed a separate brief setting forth the United States' views in that case.

[2] Our amicus curiae brief in *Citibank, N.A.* v. *Wells Fargo Asia Ltd.*, No. 88-1260, provides a brief description of the federal law governing foreign branch operations. See U.S. Amicus Br. 2-3.

In April 1975, hostile forces converged on Saigon. The American Embassy developed plans for the evacuation of United States and selected Vietnamese citizens, including Citibank employees. During this period, Citibank/Saigon informally encouraged its depositors to withdraw their money, but "the situation did not safely allow for the posting of formal notices suggesting such withdrawals" (Pet. App. 4a, 21a). On April 24, 1975, Citibank/Saigon ceased operations, and its officers and employees left the city. The officers left the books and records at the branch and entrusted the branch's cash, keys, vault combination, and official documents to Embassy officials with instructions that the items should be turned over to the National Bank of Vietnam, the government's central banking authority. The following day, the Vietnamese government issued a communique stating that Citibank/Saigon had "closed temporarily without asking for permission" and that "the National Bank guarantees to return all the money legally deposited." *Id.* at 4a, 5a, 21a-22a.

On April 30, 1975, the Vietnamese government collapsed and the following day the revolutionary forces announced the formation of a communist administration. The new government declared that all banks would be "confiscated and, from now on, managed by the revolutionary administration" (Pet. App. 4a, 22a). The communist government reopened the National Bank of Vietnam and stated that it intended to liquidate "all debtor banks, including all foreign banks" and "pay out savings to workers and people according to new banking regulations" (*id.* at 22a). In the case of "banks whose owners have fled the country, the national bank will inventory and re-evaluate their assets and settle their accounts in order to determine their ability to return the savings of account holders" (*id.* at 23a). The National Bank indicated that "the savings accounts of workers, who legitimately earn their income through their own efforts and labor, will gradually be paid to them," but the property of "comprador bourgeoisie" would be "confiscated completely or partly according to the gravity of their crimes." *Id.* at 4a-5a, 23a, 51a-52a.

Senator Trinh was placed in a "re-education" camp. After his release in 1980, he sent his Citibank passbook to respondent, who

resided in Michigan and had become a United States citizen. Respondent contacted Citibank's New York office and requested payment of the deposit. Citibank informed respondent that the National Bank of Vietnam was now responsible for the account. Pet. App. 5a, 38a.

2. Respondent brought suit in the United States District Court for the Eastern District of Michigan to collect the sums allegedly owed under the deposit agreement. After a bench trial, the district court concluded that Citibank was liable and awarded respondent the current value of the account—$1400 plus interest. Pet. App. 37a-59a. The district court began its analysis by noting that the Second Circuit had held in *Vishipco Line* v. *Chase Manhattan Bank, N.A.*, 660 F.2d 854 (1981), cert. denied, 459 U.S. 976 (1982), that a United States bank was liable to its Vietnamese depositors when it closed its Saigon branch in virtually identical circumstances. See Pet. App. 38a-39a. It therefore viewed the question as whether this case was distinguishable from *Vishipco*.

The district court first concluded that it could properly exercise jurisdiction because the parties satisfied the diversity of citizenship requirement (28 U.S.C. 1332) and, alternatively, because disputes arising out of foreign banking transactions are "deemed to arise under the laws of the United States" (12 U.S.C. 632). See Pet. App. 39a-40a. The court next agreed with Citibank that, under either jurisdictional basis, the applicable choice of law rules dictated that Vietnamese law governed the dispute. *Id.* at 41a-44a. The court then concluded that while *Vishipco* was decided under New York law, the same result would obtain under Vietnamese law, including Vietnamese principles of *force majeure*. *Id.* at 45a-50a. It also concluded that Citibank had failed to prove that the National Bank of Vietnam had assumed liability for respondent's account; instead, the court ruled as a matter of law that when Citibank closed its Saigon branch the home office assumed liability for that account. *Id.* at 50a-51a. The court then converted the value of the piaster account into dollars to determine Citibank's liability. *Id.* at 54a-59a.

3. Citibank appealed and the United States filed an amicus curiae brief urging reversal. The court of appeals affirmed (Pet.

App. 1a-32a), rejecting Citibank's "primary argument" that the deposit agreement construed under Vietnamese law placed the risk of loss for a political revolution on the depositor (*id.* at 7a-13a).

The court started from the premise, followed in *Vishipco*, that "it is a general banking principle that the home office is *ultimately liable* on a deposit placed in its foreign branch if, as here, the branch closes or otherwise wrongfully refuses to return a deposit" (Pet. App. 9a, citing *Sokoloff* v. *National City Bank*, 130 Misc. 66, 73, 224 N.Y.S. 102, 114 (Sup. Ct. 1927), aff'd, 223 A.D. 754, 227 N.Y.S. 907, aff'd, 250 N.Y. 69, 164 N.E. 745 (1928); *Bluebird Undergarment Corp.* v. *Gomez*, 139 Misc. 742, 249 N.Y.S. 319 (City Ct. 1931); Heininger, *Liability of U.S. Banks for Deposits Placed in Their Foreign Branches*, 11 Law & Pol. Int'l 903, 926 (1979)). The court acknowledged that "the bank is surely correct in arguing that absent special circumstances, deposits made in branch banks are payable only there" (Pet. App. 9a), but it added:

> However, as we read *Sokoloff*, *Bluebird* and similar cases, one of the "special circumstances" triggering liability against the home office *is* the *closing of a branch*." *Bluebird*, 249 N.Y.S. at 321-22. Thus, while it is true that the payment obligation exists *primarily* between the branch bank and the depositor, the *ultimate* obligation on the deposits remains with the home office. *Id.*; *Vishipco*, 660 F.2d at 863; *see also* Annotation, *Branch Banks*, 136 A.L.R. 471, 493-97 (1942).

Ibid.

The court stated that Vietnamese law supported that conclusion because it required Citibank/Saigon to operate as a branch, rather than a subsidiary, and thereby implicitly indicated that Citibank's home office would be liable for the deposits. *Id.* at 10a. The court concluded that the deposit agreement's waiver of liability for government action "did not dispel these expectations" (*id.* at 11a), observing:

> while we recognize that the deposit agreement absolved the *branch office* of responsibility for losses resulting from

> government orders and "any other cause beyond its control," we do not find in that agreement *any* indication that the depositor could not proceed against the home office if the branch failed to pay.

Ibid. The court stated that contractual provisions limiting home office liability "must be explicit and must clearly and unmistakably inform depositors that they have no right to proceed against the home office" (*id.* at 12a). The court also concluded that Vietnamese principles of *force majeure* did not excuse repayment because Citibank "remains able to this day[ ] to discharge those debts either in New York or at a variety of other points outside of Vietnam" (*id.* at 13a).

The court of appeals also rejected Citibank's defense that the National Bank of Vietnam had assumed liability for the respondent's account. Pet. App. 13a-17a. It concluded that South Vietnam's guarantee that all deposits would be repaid was not legally binding on the new government and that the various communiques failed to establish that, "by confiscating the nation's banks, the new government undertook to assume the *liabilities* of foreign banks, like Citibank Saigon, that fled the country in the face of the fall of South Vietnam" (*id.* at 15a). The court further reasoned, in accordance with *Vishipco*, that when Citibank closed its Saigon branch, "the deposits in Citibank Saigon no longer had their 'situs' in Vietnam" (*id.* at 16a). Instead, their situs "sprang" and attached to the home office, and the Vietnamese government was powerless to affect them (*ibid.*, citing Heininger, *supra*, 11 Law & Pol. Int'l Bus. at 975). Finally, the court agreed with the Second Circuit that holding the home office liable was "fair and equitable under the circumstances" (Pet. App. 17a, citing *Vishipco*, 660 F.2d at 864).

Judge Brown dissented, concluding ("[w]ithout intending to deprecate Citibank's other defenses") that the deposit agreement, read in light of Vietnam's *force majeure* principles, placed the risk of loss on respondent. Pet. App. 19a-32a. He stated:

> I agree with Citibank that Trinh must bear the loss of his savings deposit. I would so hold because I believe the deposit agreement so requires. * * * Here, the communist

> overthrow of South Vietnam and subsequent confiscation and nationalization of Citibank's Saigon branch surely falls within the deposit agreement's discharge-of-liability provision and prevents Citibank's domestic home office from paying Trinh in Vietnam in piasters. Consequently, the deposit agreement calls for Trinh to suffer the loss and, in turn, Trinh's action against Citibank must fail.

Id. at 30a.

DISCUSSION

Citibank asserts that the court of appeals erred in holding that the deposit agreement in this case obligated Citibank's New York office to repay foreign branch deposits when the branch closed on account of imminent invasion. It urges this Court to review the case and clarify, as a matter of federal law, that a United States bank is not liable for repayment of a foreign branch deposit when a foreign sovereign prevents the branch from making repayment. We believe that Citibank is correct in asserting that the court of appeals misconstrued the parties' deposit agreement and the principles of banking law that govern it. We also agree that the decision reflects a departure from established law and could portend future difficulties for United States banking interests. Notwithstanding these failings, we are unable to conclude that this decision, standing alone, would normally warrant this Court's review. Nevertheless, the decision raises issues related to those presented in *Citibank, N.A.* v. *Wells Fargo Asia Ltd.*, No. 88-1260, a case that we believe does merit review. If this Court grants Citibank's petition for a writ of certiorari in *Wells Fargo*, it may wish to grant this petition and to consider the related issues in a consolidated proceeding. In the alternative, it may wish to hold this petition and dispose of it in accordance with its disposition of *Wells Fargo*.

1. This case presents a factual situation that is virtually identical to that presented in *Vishipco Line* v. *Chase Manhattan Bank, N.A.*, *supra*. The Court invited the United States' views concerning the petition for a writ of certiorari filed in that case. The government noted the significant practical consequences of the

court of appeals' decision and expressed serious reservations about the court of appeals' application of the relevant law.[3] The government concluded, however, that the decision did not warrant this Court's review. 81-1591 U.S. Amicus Br. 7. We explained that this isolated decision, which purported to resolve conflicting claims under local contract law, did not present an issue that this Court normally would examine. *Id.* at 15.[4]

The court of appeals in the present case has essentially repeated the Second Circuit's mistakes in *Vishipco*. The court of appeals correctly ruled that the deposit agreement was subject to the law of Vietnam and that Vietnamese law would recognize "general banking principle[s]" that are customarily followed worldwide (Pet App. 7a n.2, 9a).[5] The court erred, however, in applying

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[3] Our brief noted that the outcome of the case has "significant practical implications," "implicates the interests of federal regulatory agencies," and "raises serious concerns about the protection of American citizens and investments overseas" (81-1591 U.S. Amicus Br. 7). It also expressed "substantial misgivings about the correctness of the decision" (*id.* at 10), noting that the deposit agreement seemed to relieve the bank of liability under the circumstances, that there is "room to doubt whether the 'spring[ing] deposit' theory applied by the court of appeals is soundly grounded in New York law," and that "it could reasonably be concluded that when Vietnam confiscated the assets abandoned by petitioner in Saigon, and thereafter assumed banking operations, it simultaneously assumed responsibility for making repayment to depositors" (*id.* at 10-11). For the convenience of the Court, we have reproduced our amicus curiae brief in *Vishipco* as an addendum to this brief. See Add., *infra*, 1a-17a.

[4] The petition had asserted that the court of appeals erroneously applied the act of state doctrine. We explained that the court of appeals' opinion "does not support that argument. Rather, the court merely applied state law * * * to resolve a somewhat unusual breach of contract dispute. The court's resolution may well be erroneous, but it does not present a substantial federal question" (81-1591 U.S. Amicus Br. 7). We also noted that this result might be avoided in the future "by amendment of the deposit contracts in question, or by separate incorporation in foreign nations that permit that course of action," which in turn "highlight[s] the fact that the decision of the court of appeals turns on the particular deposit contracts consummated by petitioner and respondents, not on any issue of federal law warranting this Court's review" (*ibid.*).

[5] As we explain in our amicus curiae brief in *Citibank, N.A.* v. *Wells Fargo Asia, Ltd.*, *supra*, the courts' references to general banking principles refers

those principles to the parties' deposit agreement. For reasons similar to those we set forth in our *Vishipco* brief, we are unable to say that this case, viewed by itself, has sufficient practical significance to warrant plenary review. Nevertheless, the federal bank regulatory agencies are deeply concerned by the court of appeals' decision, and that concern is magnified by the fact that *Vishipco* is no longer an isolated aberration.

a. As we explain in our amicus curiae brief in *Citibank, N.A.* v. *Wells Fargo Asia Ltd.*, No. 88-1260, there is essentially universal consensus that, as between private parties, " '[t]he situs of a bank's debt on a deposit is considered to be at the branch where the deposit is carried' and that 'the consequence of this limitation is that a debt on a deposit normally authorizes a demand for the money only at the relevant branch' " (U.S. Amicus Br. 10). There is also widespread consensus that, if the branch wrongfully refuses to repay the deposit on demand, the depositor may have a cause of action against the home office for the branch's breach of the deposit agreement. *Id.* at 12-13 n.17. The court of appeals properly assumed that Vietnamese law would recognize these principles. See Pet. App. 9a. The court erred, however, in failing to give effect to the specific terms of the deposit agreement in this case, which (among other matters) expressly stated that Citibank would repay the deposits only at its Saigon place of business and provided that Citibank would *not* be liable for losses resulting from "government" action "or from any other cause beyond its control" (*id.* at 3a, 21a).

There can be no serious dispute that the communist invasion of Saigon prevented Citibank from fulfilling its contractual obligation to repay respondents' account at Citibank's Saigon place of business. Nor can there be any serious dispute that this was the "cause" of respondent's loss and that this cause was beyond Citibank's control. Indeed, the court of appeals recognized that the deposit agreement's disclaimer "absolved the *branch office* of responsibility" in these circumstances. Pet. App. 11a (emphasis in original). The court nevertheless was unable to "find

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to positive banking law that enjoys virtually universal acceptance. 88-1260 U.S. Amicus Br. 9-10 n.12.

in that agreement *any* indication that the depositor could not proceed against the home office if the branch has failed to pay" (*ibid.* (emphasis in original)). But the court failed to recognize that respondent was entitled to proceed against Citibank's home office only for breach of the deposit agreement, which contractually obligated Citibank to repay respondent's deposit at the *Saigon* branch. Respondent has no cause of action *at all* unless there was an actionable breach of *that* obligation. And there was no actionable breach in this case because the deposit agreement excused a failure to pay that was caused by events beyond Citibank's control. As Judge Brown's dissent recognizes, the deposit agreement's disclaimer must necessarily discharge *both* Citibank's Saigon branch and its home office "if the governmental action or other cause precludes payment in Vietnam in piasters" (*id.* at 30a). The court of appeals' contrary conclusion judicially modifies the essential terms of the parties' agreement and holds Citibank contractually liable for obligations that it specifically declined to undertake.[6]

b. The parties' submissions concerning the law of Vietnam and general banking principles indicate that the same result would obtain even in the absence of the deposit agreement's disclaimer.[7] Article 701 of the Vietnamese Commercial Code (V.C.C.) pro-

[6] Citibank's specific promises to repay the deposit only at Citibank's Saigon's place of business and only in piasters are plainly essential terms of the agreement. Indeed, United States interest rate restrictions and Vietnamese foreign exchange controls prohibited Citibank from offering a Vietnamese citizen a dollar-denominated savings account, earning interest at a 19% annual rate, payable in the United States. See Pet. App. 2a-3a, 27a; C.A. App. 65-66, 70-72. And the court's suggestion that the deposit agreement "must clearly and unmistakably inform depositors that they have no right to proceed against the home office" (Pet. App. 12a) is inconsistent with the general understanding, reflected in the Federal Reserve Board's regulations, that a United States bank's home office is not liable for foreign sovereign interference with a foreign branch's failure to repay a deposit unless the home office expressly undertakes that liability. See 12 C.F.R. 204.128.

[7] American courts would look to the law of the place where the deposit was made to determine whether there has been an actionable breach and any consequent remedy. See, *e.g.*, *Zimmerman* v. *Sutherland*, 274 U.S. 253, 255-256 (1927); *Dunn* v. *Bank of Nova Scotia*, 374 F.2d 876, 877 (5th Cir. 1967); U.C.C. § 4-102(2) (1977).

vides that a "debtor does not have to pay damages if his violation or non-performance of contractual obligations is due to a fortuitous cause or case of *force majeure*" (Pet. App. 8a n.3). Article 1206 of the V.C.C. provides, more specifically, that a "depositary is not liable for accidents or risks resulting from *force majeure*, unless previously he had been given notice to return the deposited objects" (*ibid.*). As we have explained, Citibank's contractual obligation was to repay respondent's funds, in the form of piasters, *solely* at Citibank's place of business, which the deposit agreement defined as the Citibank/Saigon branch. As the court of appeals acknowledged (*id.* at 13a), the circumstances that prevented Citibank from fulfilling that contractual obligation fell within the meaning of *force majeure*. Since Vietnamese law provided that Citibank "is not liable" and "does not have to pay damages" (*id.* at 8a n.3, 12a) in those circumstances, it relieved Citibank of its contractual obligation. The court of appeals' suggestion that Vietnamese law "did not relieve Citibank of its obligation to perform elsewhere" (*id.* at 13a) again overlooks the fact that Citibank's contractual obligation was to perform at *Citibank/Saigon*. As Justice Holmes stated in a similar circumstance involving an Austria-Hungarian bank account:

> The only primary obligation was that created by the law of Austria-Hungary and if by reason of an attachment of property or otherwise the courts of the United States also gave a remedy the only thing that they could do with justice was to enforce the obligation as it stood, not to substitute something else that seemed to them about fair.

Zimmerman v. *Sutherland*, 274 U.S. 253, 255 (1927). Thus, "if that law discharged the debt the debt was discharged everywhere" (*id.* at 256).

c. The court of appeals also seems to have erred in rejecting Citibank's contention that the new Vietnamese government, which had "confiscated" Citibank's branch (Pet. App. 4a), had assumed responsibility for the depositor's account. The court's conclusion is inconsistent with common sense and the practical realities of the communist overthrow of the Vietnamese government. Indeed, the new government's own communiques stated that the government's central bank would liquidate "all debtor banks, including

all foreign banks," and "pay out savings to workers and people according to new banking regulations" (*id.* at 22a; see also *id.* at 5a, 23a). The court's conclusion is also inconsistent with the Foreign Claims Settlement Commission's determination that "accounts in South Vietnamese banks owned by persons or entities located outside the country were nationalized, expropriated, or otherwise taken, within the meaning of the present [International Claims Settlement] Act, as of May 1, 1975." See *In re Claim of Hugh R. Harris*, Dec. No. V-0446, at 2 (Aug. 22, 1985) (Citibank C.A. Br. App. C).

The court of appeals' alternative ruling that the new Vietnamese government could not have seized the deposit also is unsatisfactory. The court endorsed *Vishipco*'s "springing debt" theory, which holds that if a bank closes a foreign branch, " 'the situs of the debt represented by the deposit would spring back and cling to the home office' " (Pet. App. 16a & n.5). See also *Edelmann* v. *Chase Manhattan Bank, N.A.*, 861 F.2d 1291, 1304 (1st Cir. 1988) (dicta). This theory has no firm foundation in the law; instead, it rests on a metaphor that a commentator used to describe Judge Cardozo's decision in *Sokoloff* v. *National City Bank*, 239 N.Y. 158, 145 N.E. 917 (1924). See Heininger, *supra*, 11 Law & Pol. Int'l Bus. at 975. As Justice Cardozo himself later warned, "Catch words and labels * * * are subject to the dangers that lurk in metaphors and symbols, and must be watched with circumspection lest they put us off our guard." *Henneford* v. *Silas Mason Co.*, 300 U.S. 577, 586 (1937). This case aptly illustrates that point.

Judge Cardozo's decision in *Sokoloff*—which the New York courts quickly confined to its facts, see note 11, *infra*—addressed whether the Bolshevik government's seizure of a New York bank's Russian branch discharged the bank's liability to a depositor at that branch. The court determined, on the pleadings, that the depositor could maintain an action "based upon the theory of rescission with an accompanying right to restitution" or "based upon the theory of the breach of an outstanding contract" (239 N.Y. at 171, 145 N.E. at 921). The court did *not* determine that the closure of the branch office altered the situs of the debt.[8]

[8] The Court of Appeals made only a brief mention of the situs of the deposit, stating:

The "spring and cling" proposition is simply a commentator's lively, but inaccurate, description of the case.[9]

We believe that Justice Harlan's dissent in *United States* v. *First Nat'l City Bank*, 379 U.S. 378 (1965), correctly explained the principle set forth in *Sokoloff*. The Court held that the district court in that case had jurisdiction to issue a temporary tax injunction freezing a corporation's account in a U.S. bank's Uruguayan branch pending personal service on the corporation (*id.* at 385). It found no occasion to address the *Sokoloff* case (*id.* at 380-381). Justice Harlan disagreed with the Court's holding and in the course of his opinion he described the status of the Uruguayan branch account under *Sokoloff* as follows:

> The bank account is a contract for payment on demand at the Montevideo branch. If demand were wrongfully refused, a cause of action for breach of contract would be created on which [the depositor] could sue in New York. *Thus, analytically, it is not the account itself which would become*

> The intangible chose in action, at least when it is the result of a deposit in a bank, has for some purposes a situs at the residence or place of business of the debtor, though the creditor be far away * * *. The debtor in this instance, though domiciled in the United States, may have had what was equivalent to a residence in Russia while it was doing business at its Russian branch. There is doubt whether its residence in Russia can be said to have continued after its branch had been seized and its business had been closed * * *. The decision of this case does not require that such doubts should be resolved.

239 N.Y at 169, 145 N.E. at 920.

[9] Sokoloff ultimately elected to characterize his suit as a breach of contract action and eventually was awarded damages based on the value of the rubles on deposit on the date that the bank's Russian branch ceased to function. See 130 Misc. 66, 224 N.Y.S. 102 (Sup. Ct. 1927), aff'd, 223 A.D. 754, 227 N.Y.S. 907 (1928). The New York Court of Appeals affirmed the judgment, stating that the bank was precluded from arguing that the Russian government's seizure of its property rendered performance impossible because "the United States has not recognized the Soviet government, and in consequence, the seizure and nationalization of the banks is not an act of government within the recognized principles of international law" (250 N.Y. 69, 81 164 N.E. 745, 749 (1928)). Cf. *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 428 (1964); *United States* v. *Belmont*, 301 U.S. 324 (1937).

> *payable in New York, but damages for breach of the contract to pay on demand in Montevideo.*

379 U.S. at 405 n.27 (emphasis added).[10] As we have explained, there is no actionable breach of contract action in this case because the deposit agreement and Vietnamese law absolved a failure to pay where the cause of the failure was beyond the bank's control.[11]

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[10] See also *Tillman* v. *National City Bank*, 118 F.2d 631, 633 (2d Cir.) ("the deposits in defendant's branches were not converted into continuous deposits payable in New York on account of the closing of the Russian branches"), cert. denied, 314 U.S. 650 (1941); 118 F.2d at 635 (a cause of action for "the frustration of the deposit contract through the closing of the Petrograd branch, or through breach of that contract" was time barred). Accord *Tat Ba* v. *Chase Manhattan Bank, N.A.*, 616 F. Supp. 10 (S.D.N.Y), aff'd without opinion, 762 F.2d 991 (2d Cir. 1985).

[11] Moreover, as Judge Brown correctly observed, "the *Sokoloff* cases simply do not stand for the broad general proposition that an American bank's home office is always ultimately liable for the debts of its foreign branches" (Pet. App. 31a). The New York courts have confined *Sokoloff* to its peculiar facts, which involved a Russian citizen that placed his deposit, in dollars, at the U.S. bank's home office and instructed that the deposit be credited to the foreign branch. See *Dougherty* v. *Equitable Life Assurance Society*, 266 N.Y. 71, 88, 193 N.E. 897, 903 (1934); *Dougherty* v. *National City Bank*, 157 Misc. 849, 862-864, 285 N.Y.S. 491, 506-508 (Sup. Ct. 1935). The *Sokoloff* referee himself drew this distinction, observing that "we are not concerned with questions of liability for transactions originating in Russia and wholly to be performed in Russia, but with a debt incurred in this state which the defendant agreed to pay on demand at its own branch in Petrograd" (130 Misc. at 73-74, 224 N.Y.S. at 114-115). The trial court later added in determining the measure of damages:

> Where the cause of action arose exclusively in the foreign country and the jurisdiction of our courts is secured merely because the debtor has been served or his property has been attached in the state of the forum, the courts here will only grant that relief that the creditor could have secured if the action had been brought in the courts of that country; but where the jurisdiction of our courts was sought to enforce rights which arose under our laws, then the relief would be granted as of the time when the liability accrued under our laws. The decisions in this State are in harmony with the above rule.

130 Misc. at 87, 224 N.Y.S. at 128-129. See also Restatement (Third) of the Foreign Relations Law of the United States § 414 reporter's note 6 (1987) (characterizing *Sokoloff* as involving a "New York depositor").

d. The federal banking agencies, including the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency, are greatly troubled by the court of appeals' fundamental misapplication of familiar banking law principles to the deposit agreement in this case. The Second Circuit's decision in *Vishipco* created substantial uncertainty concerning the status of Vietnamese bank deposits and, more generally, the potential legal liability of United States banks for foreign branch deposits. The court of appeals' decision in this case has only compounded that uncertainty.

As we explained in amicus curiae brief in *Citibank, N.A.* v. *Wells Fargo Asia Ltd., supra*, this Court normally does not review a court of appeals' interpretation of a particular contractual agreement (88-1260 U.S. Amicus Br. 15-16). That case, we have suggested, presents an appropriate occasion for an exception to that general rule because the lower court's interpretation of the Eurodollar deposit agreements at issue there would have immediate and serious consequences for the functioning of the Eurodollar market. In contrast, the practical consequences of the court of appeals' decision in this case are not so immediate that they call as powerfully for this Court's review.

As an initial matter, the dispute in this individual case involves a relatively small amount of money—about $1400 plus accrued interest (Pet. App. 59a). Furthermore, it is not clear that United States banks are likely to face large liabilities for new claims arising from deposits held in Saigon branches during the Vietnam conflict. Other lower courts have rejected claims filed after 1981 on statute of limitations grounds. See *Tat Ba* v. *Chase Manhattan Bank, N.A.*, 616 F. Supp. 10 (S.D.N.Y), aff'd without opinion, 762 F.2d 991 (2d Cir. 1985); *Ngoc Dung Thi Tran* v. *Citibank N.A.*, 586 F. Supp. 203 (S.D.N.Y. 1983).[12] Thus, the

[12] Those courts held that the plaintiffs' suits were necessarily based upon a theory that the closing of the Saigon branches breached the deposit agreements and that the limitation period therefore commenced running upon the closing of the branch. 616 F. Supp. at 12; 586 F. Supp. at 205, 206. That approach implicitly rejects the "springing debt" theory. Other courts, however, have per-

court of appeals' interpretation of the deposit agreement, Vietnamese substantive law, and the actions of the new Vietnamese government with respect to foreign branches, are unlikely to have lasting significance.[13]

Applying the standards that the United States normally employs in determining whether to petition for a writ of certiorari, we therefore cannot say that this case clearly warrants this Court's review. If the court of appeals' decision is viewed in its proper context, it has limited practical or precedential importance. Obviously, the Sixth Circuit's replication of the Second Circuit's errors in *Vishipco* increases the danger that other courts may give those decisions greater credence or broader application than they deserve. In particular, there is a substantial possibility that American courts may mistakenly apply those cases as precedent in interpreting other deposit agreements, other foreign substantive law, and other foreign governmental actions. See *Edelmann* v. *Chase Manhattan Bank, N.A.*, 861 F.2d 1291, 1304 (1st Cir. 1988). But such possibilities are present in many cases in which review is sought from this Court, and we are reluctant to urge that this Court grant the petition based on that ground alone.

That being said, this Court may, by virtue of *Wells Fargo*'s pendency, find benefit in reviewing this case at this time. The court of appeals relied upon the same general banking law principles that are implicated in *Wells Fargo*. If, as we have urged, this Court grants the petition for a writ of certiorari in that case,

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mitted claims to proceed long after the closing of the foreign branch. See *Edelmann* v. *Chase Manhattan Bank, N.A.*, 861 F.2d 1291 (1st Cir. 1988) (Cuban certificate of deposit).

[13] It is also relevant that, as a prospective matter, United States banks may have greater latitude with respect to passbook savings accounts to set forth terms and conditions concerning home office liability in the event that a foreign government prevents a branch from repaying deposits than those banks have in the minimally documented Eurodollar market. Furthermore, United States banks may be able to amend existing agreements: the deposit agreement in this case subjected the depositor to "all subsequent amendments" of the deposit agreement (C.A. App. 126). We must assume, notwithstanding the decision in this case, that the courts would enforce such agreements or amended agreements in accordance with their terms.

it may wish to grant this petition as well and consolidate the cases for review. That procedure would allow the Court to examine a broader range of issues—and to correct the potentially troublesome decision in this case—with minimal additional expenditure of its limited resources. In the alternative, if the Court grants the *Wells Fargo* petition, it may wish to hold this petition for disposition in accordance with its resolution of that case.

2. Citibank principally argues that the Court should grant review in order to articulate a "uniform federal rule," based on federal preemption or federal common law, "that United States banks are not liable for the risk of foreign sovereign actions preventing or restricting payment of foreign deposits" (Pet. 12). In our view, however, if the Court were to grant the petition in this case it would find it unnecessary to articulate a "uniform federal rule." Citibank argued in the courts below "that the deposit agreement construed under Vietnamese law places the risk of loss for a political revolution on the depositor not on the domestic home office" (Pet. App. 7a). As we have explained, the court of appeals erred in rejecting that argument and correction of that error would provide a sufficient basis for reversal. The question presented in Citibank's petition appears to be sufficiently broad to subsume that issue.

Citibank did not propose to the court of appeals, however, that a "uniform federal rule" governing home office liability for foreign branch deposits applies in this case. This Court generally does not address arguments that the court of appeals did not have an opportunity to consider. See, *e.g.*, *Granfinanciera, S.A.* v. *Nordberg*, 109 S. Ct. 2782, 2788-2789 (1989). This practice rests, at least in part, on prudential concerns. For example, the Court indicated in *Granfinanciera* that it may obtain useful guidance from the considered views of a court of appeals and a district court that have developed a record for review. See *id.* at 2789. That concern is relevant here. For example, Citibank contends (Pet. 19-20; Reply Br. 9-10) that a uniform federal rule is necessary because United States banks may be unable to employ deposit agreements that would unambiguously relieve them of liability. This Court does not have the lower courts' views of this

essentially factual matter. Furthermore, Citibank did not introduce evidence at trial to support that assertion. Thus, the Court may ultimately find that the record in this case is inadequate to assess the matter properly.

There also are important jurisprudential reasons why the Court should decline to address an issue that was not raised below. If "Citibank's primary argument" below is correct and conclusively resolves this case, there is no *need* to search for a broader rationale.[14] The Court should be especially reluctant to employ principles of federal preemption or federal common law to correct a court of appeals' mistaken interpretation of a contractual agreement. As we observe in our amicus curiae brief in *Wells Fargo*, federal preemption and federal common law come into play only if there is a conflict between federal law or policy and otherwise applicable law. See *Boyle* v. *United Technologies Corp.*, 108 S. Ct. 2510, 2515 (1988); *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 312-314 (1981). Those doctrines—which have the far-reaching effect of displacing positive law—are not necessary if otherwise applicable law adequately protects federal interests.

This point has special relevance in the case of banking law. International banking transactions are conducted in accordance with generally understood banking law principles. Federal bank regulation has developed in tandem with, takes account of, and typically reflects those established principles. In most situations, there should be no conflict between federal interests and general banking law principles if the content of each is correctly recognized and applied. This case aptly demonstrates that point. If the court of appeals had correctly interpreted Citibank's agreement with respondent, there would be no conceivable conflict with federal interests.

We cannot say with assurance that this Court may never need to rely on federal preemption or federal common law to resolve

[14] Citibank's call for a "uniform federal rule" may reflect a concern, which we have acknowledged (see p. 15, *supra*), that this Court normally would not review a court of appeals' interpretation of a particular contract. We nevertheless believe that this Court may find it desirable to review such a case in appropriate circumstances. If this case warrants such review, then it warrants reversal on the grounds argued below.

international banking disputes. Indeed, the federal act of state doctrine and the exceptions thereto indicate that judicially-made federal law may figure prominently in such cases.[15] And we cannot deny that an advisory ruling would "provide clarity for bank management and federal regulators" (Pet. 19). But we are obliged to observe that this Court does not exercise its Article III powers for that purpose. Until a conflict materializes, in the form of a concrete legal dispute that requires application of federal law, there is no need to articulate a federal rule.[16]

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[15] As we explain in our amicus curiae brief in *Wells Fargo* (88-1260 U.S. Amicus Br. 19 & n. 29), the act of state doctrine recognizes that a foreign sovereign has authority to affect debtor-creditor relationships involving debts payable within its jurisdiction. See generally *Banco Nacional de Cuba*, 376 U.S. at 428. Thus, a U.S. bank may be relieved of its obligation to return a deposit if a foreign government seizes the depositor's foreign branch account. See, *e.g.*, *Perez* v. *Chase Manhattan Bank, N.A.*, 61 N.Y.2d 460, 463 N.E.2d 5, 474 N.Y.S.2d 689, cert. denied, 469 U.S. 966 (1984). There is no need to address that issue here, however, because the deposit agreement and provisions of Vietnamese law, properly construed, excused Citibank from performing its contractual obligation to repay the deposit. There is good reason to believe that the court of appeals committed multiple errors in concluding that (1) the new Vietnamese government seized Citibank/Saigion's assets but not its deposit liabilities (see p. 11-12, *supra*); (2) the act of state doctrine would require a U.S. court to honor such a confiscation (cf. *Belmont*, 301 U.S. at 333-334 (Stone, J., concurring)); and (3) federal law (which would govern the situs of a bank deposit for act of state purposes) would recognize the "springing debt" theory (see p. 12-14, *supra*). But there is no occasion to reach any of those questions in this case.

[16] Indeed, we are not aware of any judicial decisions that have addressed the question whether a "uniform federal rule" governs these disputes. We submit that this Court, which would have the last word on the question, should not be the first court to address it.

CONCLUSION

The petition for a writ of certiorari should be disposed of in accordance with the disposition of the petition filed in *Citibank, N.A.* v. *Wells Fargo Asia Ltd.*, No. 88-1260.

Respectfully submitted.

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NOVEMBER 1989

ADDENDUM

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-1591

THE CHASE MANHATTAN BANK, N.A., PETITIONER

v.

VISHIPCO LINE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. On April 24, 1975, respondents, ten Vietnamese corporations and one Vietnamese individual, held deposit accounts in petitioner's Saigon branch bank (C.A. App. A-24a, A-276).[1] The corporate respond-

[1] "C.A. App." refers to the Joint Appendix filed in the court of appeals.

ents held demand deposit accounts that did not bear interest. The individual respondent held a certificate of deposit that bore interest at the rate of 23½% per year (*id.* at A-24). Under South Vietnamese law and the deposit contracts, the deposits were payable solely in Saigon and solely in piastres, the currency of South Vietnam (*id.* at A-242, A-276). In opening these accounts, each depositor agreed as follows (*id.* at A-24a):

> In accepting this deposit the Bank assumes no responsibility or liability for any losses to the depositor arising out of delays in or interruptions of the Bank's business due to Acts of God, acts of governmental authority, acts of public enemy or due to war, riots, * * * civil commotions, insurrections, * * * or causes beyond the Bank's control.

In addition, the Rules for Accounts of the Saigon branch provided (*id.* at A-572): "The account-holder shall bear the risks resulting from * * * present or future legal provisions promulgated by the state where the account is kept." Those rules were incorporated in all deposit slips used to make piastre deposits.[2]

By April 1975, it became obvious that Saigon would soon fall to the communist forces (C.A. App. A-536 to A-543). Vietcong troops had surrounded Saigon and the frequency of military attacks had increased (*id.* at A-539 to A-542). A cease-fire offer had been refused by the Vietcong (*id.* at A-536), and there was fear of Vietcong reprisals against persons who associated with Americans (*id.* at A-163).

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[2] See Brief In Opposition to the Motion by the Clearing House Association of New York for Leave to File a Brief as Amicus Curiae at 4.

On April 23, petitioner's senior management in New York decided to recommend "suspending the business operations of the Saigon branch for the protection of the officers and employees" (C.A. App. A-16). That same day, the United States Embassy advised petitioner that space on a cargo jet would be available the following day for evacuation of the branch's employees and families (*id.* at A-185). On April 24, the branch "closed [its] doors" (*id.* at A-186).

When the branch closed its doors, branch officers gave the French Embassy in Saigon the combinations and keys to the locks of the branch's vaults, as well as a set of the branch's records (C.A. App. A-158 to A-159, A-552, A-553). These were turned over to the French Embassy because it was believed that the French and the North Vietnamese had good relations; petitioner also believed that this action would "protect the rights or the interests [of] the depositors, because later on, when the branch would * * * be able to * * * reopen, then the books [would be] protected" (*id.* at A-159). None of the branch's assets were removed from Saigon at the time of evacuation (*id.* at A-160).

Saigon was overrun by communist forces on April 30, 1975. On May 1, the new government issued the following decree (C.A. App. A-548):

> All * * * banks * * * will be confiscated and, from now on, managed by the revolutionary administration.

This decree nationalized all private banks in South Vietnam (*id.* at A-548 to A-551). Pursuant to this decree, the French Embassy in Saigon turned over to the new government the keys to petitioner's Saigon branch and the branch's records (*id.* at A-545 to

A-547). Since then, the entire banking function in Vietnam has been assumed by the government (*id.* at A-548 to A-551, A-544). The government apparently has permitted at least some withdrawals by certain depositors of former private banks (*id.* at A-270 to A-271).

2. Respondents, all Vietnamese nationals, sought repayment of their deposits in dollars at petitioner's home office in New York. When that was denied, they brought suit against petitioner in the United States District Court for the Southern District of New York, invoking the diversity jurisdiction of the district court. Respondents alleged that petitioner breached its deposit contracts when it refused to make payment to them in New York after closing its doors in Saigon (Pet. App. 2a).

Following a bench trial, the district court rendered judgment in favor of petitioner (Pet. App. 1b-14b). The court concluded that petitioner was not liable for the obligations of its Saigon branch because the closing of the branch "was necessitated by the state of the war in the country and the imminent fall of Saigon to communist forces" (*id.* at 11b-12b). There was no evidence that any demand had been made to withdraw the corporate deposits before the branch closed, and shortly thereafter "[a]ll the property of persons who fled Vietnam [was] confiscated by the communist regime" (*id.* at 7b, 12b).[3] The court further concluded that "[u]nder the act of state doctrine that seizure must be given effect by our courts" (*id.* at 12b). Accordingly, "Chase in New York cannot be held accountable for the obligations of its Saigon

[3] The district court found that by the time the certificate of deposit matured, "both the bank and its assets had been taken over by the communist government" (Pet. App. 14b).

branch under the circumstances of this case" (*id.* at 13b).

3. The court of appeals reversed (Pet. App. 1a-25a), concluding that petitioner was not relieved of its contractual deposit obligations by the takeover of its Saigon branch by communist forces. Initially, the court ruled that New York law applied to the contract dispute in this case (*id.* at 10a) because "neither party invoked foreign law with respect to Chase's basic obligations to its depositors and holders of certificates of deposit." The court further concluded (*id.* at 11a) that "[u]nder New York law it is clear that, unless relieved of liability under one or more of the affirmative defenses asserted by it, Chase was obligated under its contracts with plaintiffs to pay them the amounts deposited with it."

The court of appeals rejected petitioner's claim (Pet. App. 14a-16a) that the Vietnamese confiscation decree had the effect of seizing the piastre deposits at issue in this case. The court concluded (*id.* at 15a) that the confiscation order did not encompass the deposits, and that, in any event, "upon Chase's departure from Vietnam the deposits no longer had their situs in Vietnam at the time of the confiscation decree" (*ibid.*). Accordingly, since "Chase had abandoned its Saigon branch at the time of the Vietnamese decree, and since it had no separate corporate identity in Vietnam which would remain in existence after its departure, the Vietnamese decree could not have had any effect on its debt to the corporate plaintiffs" (*ibid.*).

The court of appeals also rejected petitioner's claim that there was no breach of contract because conditions prevailing in Saigon at the relevant time rendered payment impossible. The court concluded (Pet. App. 17a) that "[t]his argument must be rejected

for the reason that impossibility of performance in Vietnam did not relieve Chase of its obligation to perform elsewhere. By operating in Saigon through a branch rather than through a separate corporate entity, Chase accepted the risk that it would be liable elsewhere for obligations incurred by its branch." The court suggested (*id.* at 18a) that "Chase's defenses of impossibility and *force majeure* might have succeeded if the Saigon branch had been locally incorporated or (more problematically) if the deposit contract had included an explicit waiver on the part of the depositor of any right to proceed against the home office." [4]

Finally, the court of appeals rejected petitioner's claim (Pet. App. 18a-19a) that "the Vietnamese government took steps to assume or cancel its branch liabilities." The court determined that the Vietnamese government had confiscated the assets of petitioner, but had not attempted to alter the contracts between petitioner and its depositors. In these circumstances, the court of appeals concluded that Judge Cardozo's opinion in *Sokoloff* v. *National City Bank*, 239 N.Y. 158, 145 N.E. 917 (1924), was controlling. The court supported its holding by reference to certain considerations of fairness (Pet. App. 20a):

> A bank which accepts deposits at a foreign branch becomes a debtor, not a bailee, with respect to its depositors. In the event that unsettled local conditions require it to cease operations, it should inform its depositors of the date when its branches will close and give them the opportunity to withdraw their deposits or, if conditions prevent such steps, enable them to obtain payment at an alternative location. * * * In the

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[4] Under South Vietnamese law, foreign banks were limited to branch operations and could not incorporate local subsidiaries (see Pet. App. 18a).

rare event that such measures are either impossible or only partially successful, fairness dictates that the parent bank be liable for those deposits which it was unable to return abroad.

DISCUSSION

Although the court of appeals has decided a question of banking law of substantial concern to several federal agencies responsible for regulating and insuring the banking industry, the United States is unable to conclude that the decision below warrants further review. The sole claim presented in the petition is that the court of appeals erroneously applied the federal "act of state" doctrine, by questioning the validity or challenging the legal effect of a sovereign act of Vietnam in rendering its judgment. The opinion of the court of appeals does not support that argument. Rather, the court merely applied state law, as it was required to do in this diversity case (*Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938)), to resolve a somewhat unusual breach of contract dispute. The court's resolution may well be erroneous, but it does not present a substantial federal question.

1. The issue in this case is whether a bank's home office is responsible to depositors of a foreign branch when the branch is forced to suspend operations to protect the safety of its personnel, when the foreign government subsequently confiscates the assets of that branch, and when the deposit contracts in question call for repayment solely in local currency in the foreign country and contain a comprehensive force majeure provision. The court of appeals' resolution of this question has significant practical implications.[5] United

[5] A substantial percentage of the Nation's largest banks with foreign branches have home offices within the Second Circuit.

States banks frequently operate abroad through branch offices, and a number of foreign states require them to operate in branch form. At present, United States banks have approximately 850 branches in more than 65 foreign countries, with liabilities of more than $50 billion payable to foreign depositors in foreign currencies.

The court of appeals' decision implicates the interests of federal regulatory agencies responsible for oversight of the American banking industry, including the Comptroller of the Currency who regulates national banks such as petitioner. Because of the large amount of money deposited by foreign nationals in foreign branches of American banks, the court of appeals' decision substantially complicates the regulatory agencies' task of estimating the risk of liquidity posed by the operation of foreign branches. When examining banks with foreign branches, bank examiners have acted on the general understanding that such banks will not be required to honor deposit contracts payable in local currency when the assets of the foreign branch have been confiscated by local authorities. Nor is it expected that local currency deposits will be payable in dollars. However, the court of appeals' decision makes home offices liable for foreign branch deposits without the benefit of the foreign branch's assets to satisfy those liabilities.

The decision below also has significant implications for the Board of Governors of the Federal Reserve System as a bank regulator and "lender of last resort," and for the Federal Deposit Insurance Corporation.[6] Generally, deposits that are payable only

[6] The Overseas Private Investment Corporation, an agency of the federal government (see 22 U.S.C. 2191), is liable to petitioner as a result of the losses incurred in this case.

overseas are not insurable or assessable by the FDIC (see International Banking Facility Deposit Insurance Act, Pub. L. No. 97-110, Section 102, 95 Stat. 1513). Thus, deposits payable abroad at foreign branches of United States banks ordinarily have not been considered to be insured, and assessments generally have not been collected for such deposits. Because the courts of appeals' decision may impose substantial unanticipated liabilities on a bank's home office, the FDIC's costs may be significantly increased in the event of a bank failure (see 12 U.S.C. 1821 and 1823(e)). Similarly, the Federal Reserve System may be called upon to make loans to banks whose foreign branches are seized, in order to prevent financial embarrassment.[7]

Finally, the court of appeals' decision raises serious concerns about the protection of American citizens and investment overseas. The court below appears to have been influenced by the timing of the evacuation of petitioners' employees from Vietnam as well as petitioner's failure to give "notice" to depositors (Pet. App. 15a, 20a). It is contrary to the policy interests of the United States to penalize American banks for evacuating employees in times of emergency, and petitioner appears to have done all that it could to keep its branch open until the communist takeover. Moreover, the effectiveness of any "notice" to depositors under the conditions disclosed by the record in this case is subject to serious doubt.

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[7] Except where a depositor has received an express guaranty of repayment by the home office, foreign branch deposits have been exempt from the Federal Reserve Board's reserve requirements (12 U.S.C. 461; 12 C.F.R. 204.1) as well as its limitations on interest payments (12 U.S.C. 371a, 371b and 461; 12 C.F.R. Part 217). Thus, in exchange for the safety of a deposit payable at the branch bank's home office, the depositor generally would relinquish the high rate of interest paid to depositors at the bank's foreign branch.

2. *a.* We also have substantial misgivings about the correctness of the decision rendered by the court of appeals. The deposits in question in this case were accepted pursuant to the understanding that "[t]he account-holder shall bear the risks resulting from * * * future legal provisions promulgated by the state where the account is kept" (C.A. App. A-572). In addition, the deposits were accepted subject to a force majeure clause, which disclaimed liability for losses " 'arising out of delays in or interruptions of the Bank's business due to * * * acts of governmental authority, * * * war, * * * insurrections, * * * or causes beyond the Bank's control' " (Pet. App. 6b).[8] The court of appeals' conclusion that these contractual provisions did not relieve petitioner of the obligation to perform elsewhere overlooks the fact that the deposits called for payment in South Vietnam in the currency of South Vietnam (see page 2, *supra*).

Moreover, there is room to doubt whether the "spring[ing] deposit" theory applied by the court of appeals is soundly grounded in New York law and whether, in any event, the court below correctly applied the theory to the facts of this case (see Pet. App. 15a-16a). It appears that the operations of the Saigon branch were merely suspended during the insurgency, as permitted under federal regulatory practice, with the expectation of a resumption of operations at some later time. If that view of the facts were accepted, it would follow that the deposits did not "spring" to New York, but rather remained in Viet-

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[8] The unusually high rate of return on the certificate of deposit (23½%) may reflect the understanding of the parties of the high degree of risk inherent in placing funds on deposit in the Saigon branch. See note 7, *supra*.

nam and were seized by the new Vietnamese government along with the branch's assets.[9]

Finally, it could reasonably be concluded that when Vietnam confiscated the assets abandoned by petitioner in Saigon, and thereafter assumed banking operations, it simultaneously assumed responsibility for making repayment to depositors—particularly Vietnamese citizens such as respondents. See *Tillman* v. *National City Bank*, 118 F.2d 631, 635-636 (2d Cir. 1941). The Vietnamese decree states that the assets of foreign banks were not only to be "confiscated," but also "managed," by the new government (C.A. App. A-548), and at least some Vietnamese depositors apparently have been able to withdraw some of their funds (*id.* at A-270 to A-271). To condition a bank's contractual liability on the intentions of a foreign government, and then to construe the foreign government's seizure and management of a foreign bank branch as a nationalization of the branch's assets but not its liabilities, could encourage foreign governments to seize foreign branches with the expectation that their citizens will seek recompense from the bank's home office.

b. Respondents' reply to the foregoing arguments is that they have entered into a contract with petitioner Chase Manhattan Bank, not with a single

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[9] Under the court of appeals' analysis (Pet. App. 15a), petitioner apparently would have been relieved of its deposit obligations had the branch remained open until it was seized by the communist forces, even though that might have meant death or imprisonment for branch employees. Petitioner was held liable, however, because it closed its doors before the communist takeover. It is anomalous to draw a distinction in the timing of the evacuation of branch employees that would penalize the bank for acting in a responsible manner.

branch office. As stated in their Brief in Opposition to the Motion by the Federal Reserve Bank for Leave to File a Brief as Amicus Curiae at 1-2:

> Until April 24, 1975, the petitioner, The Chase Manhattan Bank, N.A., was present and doing business through an office in Saigon, Vietnam. The office was not a subsidiary, was not separately incorporated. Its name, and no one else's appeared on the deposit slips, bank books and other business documents. The Chase Manhattan Bank, N.A., was the debtor of the depositors. * * * No cogent reason has been presented why the banking industry should be so favored as to be treated as if its branch offices were separately incorporated without doing so; to be able to solicit business as if it were a single entity, but to dishonor its liabilities as if they belonged to another corporation.

Thus, after April 24, 1975, "the only place where the depositors could enforce their rights against the Chase was in New York" (*id.* at 4). Respondents assert, moreover, that not all of the deposits in the accounts in question were made in Vietnamese currency. "The corporate respondents were engaged in the shipping business and received 70 to 80 per cent of their earnings in United States dollars. These earnings were deposited to their account at offices and branches of the petitioner in various ports of the world" (Br. in Opp. 2).

The court of appeals essentially accepted respondents' contract theory, concluding that even though repayment may have become impossible in Saigon, it was not impossible for petitioner to make restitution

to its depositors at its home office.[10] And in reaching that result, the court of appeals found support in a prior decision of the New York Court of Appeals that addressed a similar dispute between a depositor and an American bank whose foreign branch had been expropriated. See *Sokoloff* v. *National City Bank*, 239 N.Y. 158, 167, 170, 145 N.E. 917, 919, 920 (1924). As Judge Cardozo explained in *Sokoloff* (239 N.Y. at 166-168, 145 N.E. at 919-920):

> The defendant is not a bailee for the plaintiff, nor were any of its assets ear-marked to the plaintiff's use. * * * The *res* belonging to the plaintiff was not a physical object committed to the defendant's keeping, but an intangible right, a chose in action, the right to receive rubles in the future under an executory contract. * * * The defendant's liability was unaffected by the attempt to terminate its existence and the seizure of its assets. A government of Russia *could* not terminate its existence either by dissolution or by merger, for it was a corporation formed under our laws, and its corporate life continued until the law of its creation declared that it should end. * * * [T]he ending of its Russian business was not the ending of its duty to make restitution for benefits received without requital. As to this, there would be no dispute if its as-

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[10] Under this view, even though the contracts called for repayment in Vietnamese currency in Saigon, restitution in American dollars would be appropriate if Chase closed its branch and prevented repayment in the prescribed medium at the prescribed location. The record does not indicate whether Chase had Vietnamese currency available at its home office or elsewhere, but because the currency was worthless, respondents did not want their deposits returned in that medium in any event. See note 13, *infra*.

> sets had been left intact. The situation in a legal aspect is not changed by the fact that the property of the Russian branch has been scattered or despoiled. Plaintiff did not pay his money to the defendant, and become the owner of this chose in action, upon the security of the Russian assets. He paid his money to a corporation organized under our laws upon the security of all its assets, here as well as elsewhere. * * * The situation is not changed though it be shown that the new or nationalized bank in appropriating the assets assumed the liabilities. * * * [T]here is still no suggestion of a novation, releasing the defendant and substituting its successor. * * * Its obligation as the primary debtor in its relation to its own creditors continued unimpaired.

Judge Cardozo further explained that the "doctrine of frustration" could not excuse nonpayment by the bank, even though its local assets had been confiscated. Impossibility of performance (in rubles) at its Russian branch was not a bar to restitution (in dollars) in New York (239 N.Y. at 169, 145 N.E. at 920).[11] See also *Sokoloff* v. *National City Bank*, 250 N.Y. 69, 82-83, 164 N.E. 745, 749-750 (1928) (concluding that the force majeure doctrine "does not relieve the defendant from the duty of restoring a sum not in excess of the benefits received. * * A different case would be presented if there were a claim for something more, *i.e.*, for damages for loss of profit"). Compare *Dougherty* v. *Equitable Life Assurance Society*, 266 N.Y. 71, 77, 193 N.E. 897, 898 (1934) (reaching a different result with respect to holders

[11] In *Sokoloff*, in contrast to the present case, the original deposits were made in New York.

of insurance company policies whose rights were determined solely by Russian law).

c. At bottom, the court of appeals has resolved conflicting claims under New York contract law, applying precedents of the highest court of that state. Although we have serious reservations about the correctness of the result reached, and are concerned about its regulatory implications, the decision of the court of appeals in this diversity suit does not appear to fall within that small category of cases properly subject to this Court's discretionary certiorari jurisdiction. See Rule 17.1(a) of the rules of this Court; see also *Burks* v. *Lasker*, 441 U.S. 471, 486 (1979) (the Court does not "'grant certiorari to decide [a question of state law]'"); accord, *Butner* v. *United States*, 440 U.S. 48, 57-58 (1979).

In addition, the court of appeals suggested that the result that it reached could be avoided in future cases by amendment of the deposit contracts in question, or by separate incorporation in foreign nations that permit that course of action (Pet. App. 18a). While both of these proposed solutions may pose practical problems, they highlight the fact that the decision of the court of appeals turns on the particular deposit contracts consummated by petitioner and respondents, not on any issue of federal law warranting this Court's review.

3. Petitioner nonetheless argues (Pet. 6-7) that the decision below warrants review because the court of appeals "decided a federal question" under the "act of state" doctrine, as enunciated by this Court in cases such as *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 427-428 (1964).[12]

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[12] The federal act of state doctrine, where applicable, requires judicial abstention on questions involving inquiry into

The opinion of the court of appeals does not support this argument. The court of appeals did not have occasion either to question the validity, or challenge the legal effect, of any Vietnamese confiscation order. Rather, the court concluded that the Vietnamese confiscation order had no application to the deposit rights here in question. See Pet. App. 15a ("The plain meaning of [the confiscation decree] is that the seizures involved physical assets only and did not reach whatever claim the corporate plaintiffs might have on their departure for payment of the amounts owed to them by Chase"). Moreover, the court also concluded that respondents' deposit rights were not located in Vietnam at the time of the confiscation decree and, therefore, the decree was irrelevant to their ownership. *Ibid.* ("Since Chase had abandoned its Saigon branch at the time of the Vietnamese decree, and since it had no separate corporate identity in Vietnam which would remain in existence after its departure, the Vietnamese decree could not have had any effect on its debt to the corporate plaintiffs").

In these circumstances, we do not believe that the federal "act of state" doctrine is implicated in the disposition of this controversy. The court of appeals attributed responsibility to petitioner for its branch's deposit obligations because of petitioner's contractual agreement with its depositors, not because of any action that may have been taken by the authorities in Vietnam.[13]

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the validity or permissible legal effect of an official act of a foreign government within its territory. *Underhill* v. *Hernandez*, 168 U.S. 250 (1897).

[13] In the present interlocutory posture of this case, there has been no determination of the amount of compensation owing to respondents. The court of appeals noted that, on re-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfuly submitted.

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OCTOBER 1982

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mand, the district court must arrive at a formula for "just compensation for the breach" (Pet. App. 22a). This will require the district court to determine the value of Vietnamese piastres at the time of the breach, as expressed in American dollars (*id.* at 21a-22a & n.6). Petitioner may be able to establish that, at the relevant time—approximately one week before the fall of South Vietnam—the Vietnamese piastre had a low dollar value as reflected in the prevailing exchange rate. In addition, the court of appeals noted that petitioner will have the opportunity to prove that the official exchange rate "was artificially low and should be replaced by a higher rate" (*ibid.*) due to the impending collapse of the South Vietnamese government and its official currency.

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No. 88-1031

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

CITIBANK, N.A.,
Petitioner,

—v.—

NGOC QUANG TRINH,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* IN SUPPORT OF THE PETITION AND BRIEF OF *AMICI CURIAE*

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January 20, 1989

IN THE

Supreme Court of the United States

October Term, 1988

No. 88-1031

CITIBANK, N.A.,

Petitioner,

—v.—

NGOC QUANG TRINH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION OF THE NEW YORK CLEARING HOUSE ASSOCIATION AND THE INSTITUTE OF INTERNATIONAL BANKERS FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

The New York Clearing House Association (the "Clearing House") and the Institute of International Bankers (the "Institute") move pursuant to Rules 36.1 and 42 of the Rules of this Court for leave to file the brief annexed hereto as *amici curiae* in support of the petition for a writ of certiorari. Petitioner has consented to the filing of such brief, but respondent has refused to do so.

The Clearing House is an association of twelve leading commercial banks in the City of New York.[1] It clears com-

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[1] The members of the Clearing House are The Bank of New York, The Chase Manhattan Bank, N.A., Citibank, N.A., Chemical Bank, Morgan Guaranty Trust Company of New York, Manufacturers Hanover Trust Company, Irving Trust Company, Bankers Trust Company, Marine Midland Bank, N.A., United States Trust Company of New York, National Westminster Bank USA, and European American Bank.

mercial drafts and items in the New York City area, operates two electronic payment systems, including the Clearing House Interbank Payment System ("CHIPS") and files *amicus curiae* briefs before courts of appellate jurisdiction in cases which raise significant questions of law relating to banking.

The Institute of International Bankers is a non-profit corporation organized under the laws of New York, and is the only nationwide association of foreign banks with United States banking operations. A principal purpose of the Institute is the presentation of the views of foreign banks operating in the United States on issues of federal and state laws and policies affecting those operations. In that connection, the Institute has participated, through the filing of briefs *amicus curiae*, in cases that raise significant legal issues affecting foreign banking organizations maintaining United States operations.

The Clearing House's and the Institute's member banks are major participants in international banking. As of year-end 1987, for example, of the total of 902 branches operated in foreign countries by all United States banks which are members of the Federal Reserve System, 400 were operated by Clearing House banks, and the total deposit liabilities of the Clearing House member banks' foreign branches exceeded $170 billion. The Institute's membership includes more than 230 foreign banks, from over 50 countries, which maintain subsidiary banks, branches, agencies, or representative offices in the United States.

The Clearing House and Institute banks thus have a substantial interest in the application of fair, rational, and certain rules of law to international banking, as well as in the maintenance of a statutory and regulatory structure which enables those banks to compete effectively. The decision below threatens the stability and equity of that legal

regime by exposing United States banks, and by a parity of reasoning foreign banks doing business here, to novel and potentially vast liabilities on account of political upheavals in other countries.

For the reasons stated herein, the Clearing House and the Institute respectfully pray that the Court grant this motion for leave to file their brief.

Respectfully submitted,

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January 20, 1989

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IN THE

Supreme Court of the United States

October Term, 1988

No. 88-1031

CITIBANK, N.A.,

Petitioner,

v.

NGOC QUANG TRINH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION AND THE INSTITUTE OF INTERNATIONAL BANKERS AS *AMICI CURIAE*

The New York Clearing House Association and the Institute of International Bankers submit this brief as *amici curiae* in support of the petition and on an issue of vital importance to the United States banking system: Whether the home office of a United States bank may be held liable for deposits placed in a foreign branch when the foreign government prevents repayment of those deposits by the branch.[1]

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[1] These *amici* plan also to submit a brief as *amici curiae* in support of the petition for certiorari shortly to be filed by Citibank, N.A. in *Wells Fargo Asia Ltd.* v. *Citibank, N.A.*, 852 F.2d 657 (2d Cir. 1988), another case presenting the same issue but in a different factual context, and respectfully suggest that the Court consider the two petitions together.

Statement

The decision below imposed liability on petitioner Citibank for a deposit made at its former Saigon branch on the ground that the closing of the branch shortly before the fall of Saigon to communist forces caused the deposit liability to "spring back" to Citibank's home office in New York (9a-10a, 16a & n.5).[2] Because of this alleged change in the situs of the deposit obligation, and for other reasons, the court of appeals rejected Citibank's contractual and statutory defenses of *force majeure* under Vietnamese law (7a-13a) and Citibank's contention that both the South Vietnamese central bank and the revolutionary regime had successively assumed by operation of law all deposit liabilities of the former branch (13a-17a).

In the end, the court of appeals appears to have applied what it deemed to be general common-law principles without a firm basis in any source of law, but purporting to be drawn from a variety of sources. The court nowhere addressed the compelling analysis of the requirements of United States law and policy with respect to the decision in this case emphasized by both Citibank and the United States in their respective briefs below.

Summary of Argument

The court of appeals articulated and enforced a rule of decision fixing vast liabilities on the United States banking system by misconstruction of general principles of law and without the slightest advertence to the strong considerations of United States public law and policy dictating a contrary conclusion.

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[2] Citations in the form "—a" are to the appendices to the petition. The joint appendix in the court of appeals is cited "JA".

A proper judicial analysis both of generally accepted legal principles and of the practical consequences of possible rules for the United States and its banking system requires that this Court exercise its plenary jurisdiction to prescribe a federal rule of decision precluding the imposition of liability on United States banks for foreign branch deposits when the branch's host government has prevented repayment by the branch.

Argument

The framework of federal law, regulation and policy and the considerations of national interest which require a federal rule of decision precluding liability in this and similar cases are fully discussed in the petition and need not be recanvassed here. We wish to emphasize only the following points.

A. The potential exposure to the United States banking system created by this and similar decisions of the lower courts runs to tens, if not hundreds, of billions of dollars; the Clearing House member banks alone have 400 foreign branches with deposits of over $170 billion. These decisions cannot be traced to basic and accepted legal principles; instead they ignore both such principles and clear and consistent articulations of federal law and policy regarding international banking, as shown in the petition. The creation of such massive risks cannot but have a substantial adverse effect on the maintenance and growth of the foreign branch operations of American banks, which have been fostered for decades because of their facilitation of the country's foreign commerce and of the Government's military, diplomatic, foreign aid and other activities abroad. The importance of these services to the Nation's economic

well-being and to the Government's conduct of foreign affairs is immeasurable.

B. The general need for legal certainty in the conduct of commerce is especially strong in international banking. The whole foundation of banking is the continual creation on a vast scale of executory contracts in the forms of deposits and loans; for this business to be conducted on an international scale, governing legal principles must be clearly articulated and understood. The branch situs rule for deposit obligations, paid lip service by the court of appeals (9a), had been thought to be such a principle and underlies both the framework of federal banking regulation and the daily conduct of business by international banks. Under that principle, historically recognized by courts in all world financial centers but disregarded below, a bank stands behind the commercial soundness of its foreign branches, but has no responsibility for legal regulation or political acts of the host state, which are understood to control the branch operations as a part of that state's own banking system.

C. It is undisputed that the original situs of the deposit here in question was Saigon. Indeed, it could have been nowhere else, for Vietnamese law precluded the transmission of the deposited funds outside the country for any purpose, including the establishment of a bank account in New York (JA 65, 126-27; see 20a). The result reached below thus necessarily depends on the conclusion that the evacuation of Citibank's employees shortly before Saigon fell and the consequent suspension of the Saigon branch's operations caused the situs of the deposit to "spring" to New York, a conclusion which is wrong as a matter of United States law:

1. The court of appeals' rejection of Citibank's contractual and statutory *force majeure* defenses under Viet-

namese law, while itself in error, cannot be decisive. The suspension of branch operations was a result of Citibank's compliance with the evacuation program of the United States authorities in Saigon. Aside from the fact that no law enjoins upon banks or other firms callous indifference to the safety and lives of their employees, any American organization in a foreign combat zone is duty bound to heed such instructions from the President's diplomatic and military representatives on the spot, rather than leaving hostages in the hands of an enemy regime. As a necessary corollary to the President's powers as Commander-in-Chief and in the conduct of foreign affairs, the juridical effect of compliance with his delegates' instructions, when placed in issue in our courts, must be determined as a matter of United States federal law. That effect surely cannot be the creation of new and additional obligations "springing" out of a foreign country into our own.

2. Nor can our national law admit of the peculiar notion espoused by the court of appeals to the effect that unfriendly foreign regimes may confiscate the assets of branches of United States banks within their countries without assuming their corresponding liabilities, but "instead" leaving those liabilities to be satisfied by the banks at their home offices (15a). Such a notion is novel, to say the least, and provides a blueprint for the waging of economic warfare against the United States by enabling hostile regimes to confiscate branch assets and send the depositors, including their own nationals, to collect a second time from the domestic assets of our banks. Indeed, the acceptance of such a notion by our courts would threaten not only our own banking system but those of other countries whose banks are subject to *in personam* jurisdiction in our courts. Not only is such a notion *a priori* absurd, but it makes a mockery of long standing regulatory practices whereby

safety and soundness regulation of branches is committed to the host country.[3]

D. Nor is there any domestic source of law from which a rule can be derived in support of the decision below. Indeed, the complete lack of legal basis for the decision below and the corresponding need for this Court to articulate a rule binding on all United States courts is evidenced by the analytical deficiencies of the decision below, which are unfortunately not atypical of such cases. Thus while the court of appeals' general principles were drawn in part from the Second Circuit's decision in *Vishipco*,[4] which in turn purported to apply New York law, New York statutory and decisional law unequivocally repudiates the result reached: *Vishipco*, the Heininger article [5] and the decision below all ultimately purport to construct the "springing" situs concept from the *Sokoloff* case.[6] *Sokoloff*, however, sets forth no such concept, and the New York Court of Appeals has held that *Sokoloff* involved "a deposit made in the National City Bank in the city of New York, governed solely by New York law," and has expressly limited it to those facts. *Dougherty* v. *Equitable Life Assurance Soc'y*, 266 N.Y. 71, 88, 193 N.E. 897, 903 (1934); *see also Tillman* v. *National City Bank*, 118 F.2d 631 (2d Cir. 1941), *cert. denied*, 314 U.S. 650 (1941). And the New York Legislature has mandated in Section 138 of the New

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[3] If the law of Vietnam in fact had purported to have such effect, which it did not, it would not have been given effect here as a matter of comity for it would have been repugnant to our own policies and in derogation of the rights of own our citizens. *Hilton* v. *Guyot*, 159 U.S. 113, 164 (1895).

[4] *Vishipco Line* v. *Chase Manhattan Bank, N.A.*, 660 F.2d 854 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982) (Justices White and Powell dissenting).

[5] Heininger, *Liability of U.S. Banks for Deposits Placed in Their Foreign Branches*, 11 LAW & POL. INT'L BUS. 903 (1979).

[6] *Sokoloff* v. *National City Bank*, 239 N.Y. 158, 145 N.E. 917 (1924).

York Banking Law (McKinney 1971 & Supp. 1989) that the liability of any bank on account of foreign branch deposits be reduced *pro tanto* by the value of confiscated branch assets in circumstances such as are present here.

Thus, the general principles regarding home office liability for foreign branch deposits on which the court of appeals purported to rest its decision simply do not lead down the path it followed.

Conclusion

For the reasons stated in the petition and herein, *certiorari* should be granted to review the judgment of the United States Court of Appeals for the Sixth Circuit.

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Nos. 88-1031 and 88-1260

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IN THE

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OCTOBER TERM, 1989

CITIBANK, N.A.,

Petitioner,

v.

NGOC QUANG TRINH,

Respondent.

CITIBANK, N.A.,

Petitioner,

v.

WELLS FARGO ASIA LIMITED,

Respondent.

On Petitions for Writs of Certiorari to the United States Courts of Appeals for the Sixth and Second Circuits

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PETITIONER'S SUPPLEMENTAL BRIEF PURSUANT TO RULE 22.6 IN RESPONSE TO THE SOLICITOR GENERAL'S BRIEFS FOR THE UNITED STATES

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

Nos. 88-1031 and 88-1260

CITIBANK, N.A.,

Petitioner,

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On Petitions for Writs of Certiorari to the United States Courts of Appeals for the Sixth and Second Circuits

---

PETITIONER'S SUPPLEMENTAL BRIEF PURSUANT TO RULE 22.6 IN RESPONSE TO THE SOLICITOR GENERAL'S BRIEFS FOR THE UNITED STATES

Pursuant to Rule 22.6 of the Rules of this Court, petitioner Citibank, N.A. ("Citibank") files this brief in response to the Solicitor General's *amicus curiae* briefs for the government in these cases.

In its petitions, Citibank asked this Court to grant certiorari in both *Wells Fargo* and *Trinh* to correct a

fundamental error of substantial importance to the U.S. banking system and the body of federal regulations on which that system is based. In response to the Court's invitation, the Solicitor General has joined Citibank in urging that the Court grant certiorari in *Wells Fargo*, although he would prefer that the Court limit its grant to the second of the two questions Citibank has presented. With respect to *Trinh*, the Solicitor General recommends that the Court either grant Citibank's petition and consider the case together with *Wells Fargo* or hold the case until *Wells Fargo* has been decided.

Although Citibank agrees with much of what the Solicitor General says in both *Wells Fargo* and *Trinh*, Citibank believes that the preferred course would be for the Court to grant certiorari as to both of the questions presented in Wells Fargo and to grant certiorari in *Trinh* and consolidate it with *Wells Fargo* for purposes of oral argument. This approach will preserve the Court's prerogative to dispose of the cases on the ground that it concludes to be most appropriate after full briefing and oral argument.

The Solicitor General and Citibank begin from a common starting point. Federal regulation of foreign operations of U.S. banks has long been premised on the fundamental distinction between deposits payable in the United States and those payable only abroad.[1] Indeed, the Federal Reserve Board by regulation (subsequently codified by Congress) has expressly provided that a "customer who makes a deposit that is payable solely at a foreign branch of the depository institution assumes whatever risk may exist that the foreign country in which a branch

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[1] *See* Brief for the United States as Amicus Curiae, *Citibank, N.A. v. Wells Fargo Asia Ltd.*, No. 88-1260, at 18 (filed Nov. 2, 1989) [hereinafter "U.S. *Wells Fargo* Brief"]; Brief for the United States as Amicus Curiae, *Citibank, N.A. v. Trinh*, No. 1031, at 10 n.6 (filed Nov. 2, 1989) [hereinafter "U.S. *Trinh* Brief"].

is located might impose restrictions on withdrawals." [2] The Solicitor General recognizes that any other allocation of sovereign risk would raise serious federal concerns.[3] Thus, the Solicitor General finds that the federal interest involved in these cases is substantial and furthermore unequivocally concludes that the decisions of the courts of appeals in both cases are clearly wrong and harmful.

The Solicitor General believes that there are two alternative ways of dealing with the problems he identifies in *Wells Fargo* and *Trinh*. He agrees that one approach would be that urged by Citibank: articulation of a uniform federal rule specifying when U.S. banks are liable for deposits made with their foreign branches. In the alternative, the Solicitor General contends that proper application of "general banking law principles," grounded in state and foreign law, should be adequate to safeguard the important federal interests at stake in *Wells Fargo* and *Trinh*. The Solicitor General would have this Court correct the lower courts' misapprehension of these general banking law principles pursuant to 12 U.S.C. § 632 (1988), under which suits against national banks "arising out of transactions involving international or foreign banking" are "deemed to arise under the laws of the

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[2] 12 C.F.R. § 204.128(c) (1989).

[3] U.S. *Wells Fargo* Brief at 18 ("The federal banking agencies have long premised their regulations on an understanding that a depositor who opens a foreign branch account assumes the risk that the foreign government may restrict his right to repayment. Citibank is correct that a contrary understanding would create a serious tension with federal reserve and deposit insurance requirements."); U.S. *Trinh* Brief at 10 n.6 ("the court's suggestion that the deposit agreement 'must clearly and unmistakably inform depositors that they have no right to proceed against the home office' (Pet. App. 12a) is inconsistent with the general understanding, reflected in the Federal Reserve Board's regulations, that a United States bank's home office is not liable for foreign sovereign interference with a foreign branch's failure to repay a deposit unless the home office expressly undertakes that liability").

United States." There is a fine distinction between federal courts' articulating uniform "general banking law principles" applicable to international banking actions "deemed to arise under" federal law, on the one hand, and based on federal statutes and regulations applicable to international banking, on the other.

Citibank submits that it would be premature for the Court to decide at this point the grounds that it will rely upon in ultimately ruling in *Wells Fargo* or *Trinh*. It may be that, after full briefing and oral argument, the Court will agree with the Solicitor General and reserve the question of federal substantive law for decision in another case, having concluded that there is some narrower ground on which federal interests can be protected in these cases. On the other hand, the Court may conclude that such a narrower ground is not available here, or that, even if available, it is preferable to articulate a federal rule of decision in this case so as to bring greater certainty to what the Solicitor General himself believes to be an uncertain and troublesome area. U.S. *Trinh* Brief at 16. Accordingly, we believe the better course would be for the Court to grant certiorari as to both questions presented in the *Wells Fargo* petition, preserving its ability to rule on either of the two grounds identified by the Solicitor General.

With respect to *Trinh*, the Solicitor General suggests that, if the Court grants certiorari in *Wells Fargo*,

> it may wish to grant this petition as well and consolidate the cases for review. That procedure would allow the Court to examine a broader range of issues —and to correct the potentially troublesome decision in this case—with minimal additional expenditure of its limited resources.

U.S. *Trinh* Brief at 17. In the alternative, the Solicitor General recommends that the Court hold *Trinh* for consideration in light of the Court's ultimate decision in *Wells Fargo*.

Citibank submits that the first of the options offered by the Solicitor General is more efficient and preferable. First, consolidating the two cases will give the Court the opportunity, as the Solicitor General observes, "to examine a broader range of issues." U.S. *Trinh* Brief at 17. *Trinh* presents the same basic problem as *Wells Fargo*, but in a very different factual context and with very different immediate ramifications. Where *Wells Fargo* involves an oral deposit agreement between two sophisticated banks with respect to the off-shore deposits of dollars, *Trinh* involves a passbook savings account of local currency (Vietnamese piasters) deposited by a foreign individual. In addition, *Trinh* raises substantial questions of U.S. foreign relations policy that are better presented in that case than they are in *Wells Fargo*. Such issues include U.S. policy toward U.S. businesses evacuating foreign countries in times of revolution and armed conflict and U.S. participation in claims settlement arrangements growing out of foreign government expropriations. The Court therefore has the rare opportunity to grant certiorari in two cases that together present a relatively comprehensive view of an important federal problem, thereby leading to resolution of many of the issues at one time.

Second, U.S. banks remain at substantial risk from the possibility of foreign civil and political unrest and it is therefore of utmost importance that doctrines such as those relied upon by the court of appeals in *Trinh*—doctrines that the Solicitor General urges are fundamentally mistaken—be put to rest. The small amount of the claim immediately at stake in *Trinh* and the fact that future cases from Vietnam are unlikely in no way limits the extent of the risk posed for the U.S. banking system. Foreign branches of Citibank alone hold hundreds of millions of dollars worth of local currency deposits similar to that involved in *Trinh*, and these branches are often in politically unstable nations; such deposits are now at risk under the court of appeals ruling in *Trinh*. Nor does the

fact that there may not be many Vietnamese cases in the future indicate that *Trinh* is not an important case in its own right. As the Solicitor General agrees, "there is a substantial possibility that American courts may mistakenly apply [*Trinh* and *Vishipco Line v. Chase Manhattan Bank, N.A.*, 660 F.2d 854 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982)] as precedent in interpreting other deposit agreements, other foreign substantive law, and other foreign governmental actions." U.S. *Trinh* Brief at 16. Indeed, the Solicitor General recognizes that both the Sixth Circuit below and the Second Circuit in *Vishipco* purported to apply " 'general banking law principle[s]' that are customarily followed worldwide." U.S. *Trinh* Brief at 8. Given that the erroneous decision in *Vishipco* is now "no longer an isolated aberration" (U.S. *Trinh* Brief at 9), and given the need of bank regulators and banks alike to plan for risk in advance of actual crises, it is important that the Court at this stake reserve its prerogative to address directly the issues posed by *Trinh*.

CONCLUSION

In both *Wells Fargo* and *Trinh*, the lower courts have committed errors that raise substantial questions of federal law and policy. In both there are alternative means potentially available for remedying the problem. One alternative is for the Court to articulate a uniform federal rule of bank liability with respect to foreign branch deposits, as urged by Citibank; another route to the same end may be, as the Solicitor General suggests, to correct the mistakes of the lower courts by invoking "general banking law principles" that are "deemed to arise" under federal law by virtue of congressional statute. Given the admitted importance of the federal interests involved, the clear errors of the lower courts, and the opportunity to review this important issue in quite different factual contexts "with minimal additional expenditure of [judicial]

resources" (U.S. *Trinh* Brief at 17), the Court should grant certiorari in both cases and consolidate them for purposes of oral argument.

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NGOC QUANG TRINH,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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SUPPLEMENTAL BRIEF FOR PETITIONER PURSUANT TO RULE 15.7

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IN THE

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OCTOBER TERM, 1989

No. 88-1031

CITIBANK, N.A.,

Petitioner,

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NGOC QUANG TRINH,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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SUPPLEMENTAL BRIEF FOR PETITIONER PURSUANT TO RULE 15.7

Pursuant to Rule 15.7 of the Rules of this Court, petitioner Citibank, N.A., files this brief in light of the Court's decision yesterday in *Citibank, N.A. v. Wells Fargo Asia Ltd.*, No. 88-1260 (May 29, 1990). This case and *Wells Fargo* are companion cases in this Court, and the present petition apparently is being held pending disposition of *Wells Fargo*. Now that *Wells Fargo* has been decided, we submit that the Court should grant certiorari and set this case for consideration on the merits or, at the least, vacate the decision below and remand the case to the court of appeals for further consideration.

As we explained in our certiorari petition, this case presents an important and recurring question that warrants the Court's review. By imposing liability on the home office of a United States bank when a foreign government has prevented the bank's foreign branch from repaying a deposit, the "decision below collapses the distinction carefully established in federal law between domestic and foreign deposits." Pet. 6. Moreover, as the Solicitor General stated in his *amicus curiae* brief at the petition stage, "[t]he federal banking agencies * * * are greatly troubled by the court of appeals' fundamental misapplication of familiar banking law principles to the deposit agreement in this case" (U.S. Am. Br. 15), and the erroneous decision below has "compounded the substantial uncertainty" that exists in this area of the law (*id.* at 15) and "portend[s] future difficulties for United States banking interests" (*id.* at 7). Because of the particular need for certainty and predictability in the banking field, the Court should grant the petition and resolve the basic legal rules that govern routine banking transactions in foreign branches of United States banks.

At a minimum, the Court should grant the petition, vacate the judgment of the court of appeals, and remand the case for further proceedings. Given that the responsible federal agencies are "deeply concerned" about (U.S. Am. Br. 9) the erroneous decision below, that ruling—which reflects no recognition whatsoever of the applicable federal provisions and policies implicated here—should not simply be allowed to stand. By vacating and remanding, the Court would enable the court of appeals to reconsider its decision in light of the considered views of the federal banking regulators and the Department of State expressed in the *amicus* briefs filed in this case and *Wells Fargo*. Indeed, now that the Solicitor General has forcefully presented the position of the United States, it would significantly increase the prospects of a conflict in the circuits if the contrary ruling of the Sixth Circuit were to remain in effect.

Furthermore, the decision below suffers from a critical defect similar to that which led this Court to vacate and remand in *Wells Fargo*. While the Sixth Circuit purported to apply Vietnamese law (Pet. App. 7a n.2), in fact its ruling was expressly grounded in "general banking principle[s]" (*id.* at 9a) and relied entirely on authorities under New York law; the court did not cite (nor did respondent, *see id.* at 28a (Brown, J., dissenting)) a single Vietnamese source indicating that Citibank's home office would be liable for deposits in its Saigon branch if the government of Vietnam prevented the branch from making repayment. Because of the Sixth Circuit's reliance on general banking principles (compare *Wells Fargo*, slip op. 12) and the resulting uncertainty about the exact nature of its decision, this case, like *Wells Fargo*, should be remanded "for the Court of Appeals to determine which law applies, and the content of that law" (*Wells Fargo*, slip op. 11).

Respectfully submitted,

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